NAVAL WAR COLLEGE

International Law Situations

WITH SOLUTIONS AND NOTES

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PREFACE

The annual publication of the Naval War College on international law for 1936 has been prepared, as formerly since 1901, by George Grafton Wilson, LL. D., professor of international law at Harvard University. It covers topics upon which opinion has been changing, particularly since 1920, and which have been the subject of discussion by members of the senior class of 1937. The method followed has been to propound situations for consideration by members of the class and, after critical discussion, to organize the material for publication.

While the conclusions reached as a result of the discussions are in no way official, the notes afford a convenient survey of material relating to the subjects presented, and they should be of value for purpose of reference.

Criticism concerning the contents of this volume and suggestions regarding situations to be given consideration in subsequent volumes will be welcomed by the Naval War College.

C. P. Snyder,
Rear Admiral, United States Navy,
President, Naval War College.

May 17, 1937.

CONTENTS

SITUATION I

INSURRECTION, BELLIGERENCY, STATEHOOD

There has been an insurrection in a part of state Y. The insurrectionists, known as the Yotists, have received unofficial aid and some sympathy from state X, and after a few weeks have been recognized by state X as state Yota. States A and B also recognize Yota, but state Y has not recognized Yota.

(*a*) Yota subsequently declares war against state C.

(1) How should naval and aircraft of Yota and of C be treated in state B and in state D?

(2) What effect would the recognition of Yota as a state by Y have upon the treatment of naval and aircraft of Yota and of C?

(*b*) Before Yota is recognized by state Y, a cruiser of Yota captures a merchant vessel of D and is taking it to a prize court when a cruiser of state D, which is near, learns the facts. What action may the cruiser of state D legally take?

(*c*) Before Yota is recognized by state Y, state E declares its ports open under the 24-hour rule, while Yota declares all its ports closed to vessels of war. What are the rights of vessels of war of E in the ports?

SOLUTION

(*a*) 1. The naval air aircraft of Yota and of C are to be treated by states B and D as naval and aircraft of belligerents, though Yota would not be regarded as a state by state D.

2. The recognition of Yota as a state by Y entitles the naval and air craft of Yota to the same treatment as the naval and air craft of state C in all neutral ports.

(*b*) The cruiser of state D may, outside the jurisdiction of a foreign state, demand the release, and, if refused, use necessary force to secure the release of the merchant vessel of D.

(*c*) State E, not having recognized the Yotists as a state, are not bound to respect the declaration of closure, though state E must take into consideration the risk involved in disregarding the declaration.

NOTES

General.—That there is a right of revolution has in practice been accepted for many years. The older European states were particularly opposed to this doctrine in the early nineteenth century, when they had American colonies, and established states usually looked upon revolutions with disfavor. Gradually it came to be admitted that there was a limit beyond which an established state should not be responsible for action of persons in armed organized revolt against its political authority, and these insurrectionists were not to be regarded as pirates, even though parent states did sometimes declare them to be pirates. Many modern states were obliged to look to successful revolutions as the ground upon which their existence rested. There are various reasons for accepting such an assertion. If the successful revolutionists were not admitted to have some status, many obligations which the revolutionists might have assumed would be empty. The established state could not be liable beyond the exercise of the force at its disposal.

Just when a foreign state would decide that those admitted to be insurgents were beyond the control of

the established state and should receive recognition as belligerents was a political question for the foreign state, unless the parent state should earlier recognize belligerency by a resort to war or otherwise. Foreign states are not under obligation to suffer undue inconvenience in order that a weak established state may have an unlimited time to put down an uprising within its borders. Many questions arise as to the nature of rights and obligations of established states and insurgents.

State or government and international law.—The state or the government of a state may have many functions and attributes relating to internal and relating to external affairs. The internal affairs may rest upon constitutional law, while the external may be determined by international law.

A political entity, which by constitutional law of a state might have no existence, might become for international law a matter of capital importance. The domestic and international legitimacy of the existence of a political entity may rest upon conditions of altogether different nature. The legitimacy of the existence of a political entity for international law may depend upon the action of one or more foreign states, and this action may be in contravention of the will of an established state from which the political entity may be separating. This is evident in many states of revolutionary origin.

Recognition of belligerency.—The admission of insurgency by the competent authorities of a foreign state may bring into operation certain domestic laws and certain treaty obligations of that foreign state though no international status is accorded to the insurgents. The recognition of belligerency does, however, give an immediate parity in international military status to both parties to the conflict. This is a general parity of mili-

tary rights as regards all states when recognition is by the parent state, or as regards the recognizing state or states when the parent state has not recognized the insurgents as belligerents.

Recognition of belligerency is thus a formal act establishing a status which changes the relations of all parties involved. When this change shall be made is usually a matter of policy and therefore a matter primarily concerning the political departments of the governments.

It is true that in the case of the *Three Friends* the Court uses the word "recognition" both for political revolt and for war. The court, however, does distinguish between political revolt and war and implies that the first may be a fact and the second a status, saying:

> "The distinction between recognition of belligerency and recognition of a condition of political revolt, between recognition of the existence of war in a material sense and of war in a legal sense, is sharply illustrated by the case before us. For here the political department has not recognized the existence of a de facto belligerent power engaged in hostility with Spain, but has recognized the existence of insurrectionary warfare prevailing before, at the time and since this forfeiture is alleged to have been incurred." (166 U. S. 1.)

The President had in 1895 and in earlier messages stated the fact that "Cuba is again gravely disturbed" and that the people of the United States should take this fact into consideration in their actions. The Court maintains that domestic laws in regard to neutrality may become operative without any status of belligerency, while the recognition of belligerency would bring into effect blockade, visit and search, contraband, and other interference by the belligerent parties without claim for reparation or damages. By the recognition of belligerency, the status of all parties as far as the recognizing states are involved is changed and their relations are to a considerable degree a matter of concern for international law.

Admission of insurgency.—The words "admission" and "recognition" have often been used without distinction as applying to insurgency. On examination there seems to be a distinction which has been made in actual practice.

The fact of an insurrection is usually evident, and as such must be admitted by the parent state and by foreign states. To this fact foreign states may have to accommodate themselves without implying anything as to the final issue or present nature of the fact. As was pointed out in the case of the "Salvador" in 1870 by the Judicial Committee of the Privy Council, a main point in a case involving insurrection is the factual one of the existence of an insurrection. The Judicial Committee found "there was an insurrection in the island of Cuba; there were insurgents who had formed themselves into a body of people acting together, undertaking and conducting hostilities" (L. R. P. A. C. 1869–71, III, p. 218).

It is not even essential that there be any formal governmental proclamation by any state of the existence of an insurrection. The domestic peace of a state is often disturbed without involving other states beyond presuming that they will govern their conduct accordingly. A foreign government may bring to the attention of its citizens or of some of its departments the fact of an insurrection. Such a notice may even be regarded by the courts as official for domestic purposes. This was mentioned by the Supreme Court in the case of the *Three Friends*, in 1897, after President Cleveland had referred in his message of December 2, 1895, to an insurrection as existing in Cuba:

"We are thus judicially informed of the existence of an actual conflict of arms in resistance of the authority of a government with which the United States are on terms of peace and amity, although acknowledgment of the insurgents as belligerents by the political department has not taken place." (166 U. S. 1.)

In this case it was stated that a certain section of domestic law would be in effect and its operation would not "depend upon the recognition of belligerency."

After such an admission by a foreign state, that state might be under obligation to accommodate its conduct to the facts, but it would not thereby grant to the parent state and to the insurgents parity of military rights. A foreign state may, without implying any judgment upon the issues or extent of the conflict, admit that there is a conflict and instruct those under its jurisdiction accordingly. The fact of an insurrection may bring into operation domestic laws and these domestic laws of one state do not necessarily conform to the laws of other states.

By treaty, however, a measure of uniformity may be envisaged. Since 1928 a Convention relating to the Duties and Rights of States in the Event of Civil Strife, (Habana, Feb. 20, 1928, 46 Stat. Pt. 2, 2749), to which the United States is a party, has distinctly obligated the parties to the treaty to follow a line of conduct implying the admission of a different status from that binding in time of peace or when belligerency is recognized. This Convention is, at present, regional in its operation.

Insurgency.—That there is a status of insurgency which does not involve the consequences of belligerency is now well established. The admission that such a status exists has been somewhat reluctantly made by European states. There was a fear in the early nineteenth century that such admission might be an encouragement to revolution. On the American continents most of the states were revolutionary in origin and some admission of the facts of the struggle and accommodation of action to the facts often became necessary prior to the recognition of belligerency. A foreign state might be deterred by political or other reasons from granting to insurgents the same war rights as those to which the parent state was

entitled yet the fact of armed conflict could not be denied. The parties engaged in the hostilities could not claim rights of belligerents until the parent state had recognized that a state of war existed, except as regards an individual state which had declared its neutrality. The parent state might regard a declaration of neutrality in advance of an act on its part equivalent to a declaration of war as an unfriendly act by the state making the neutrality declaration, since so far as the conduct of hostilities is concerned the declaration places the parent state and the insurgents upon the same footing as belligerents.

United States v. *Palmer*, *1818.*—In a case involving questions in regard to piracy in connection with the civil war in Spanish-American areas, it was said by the Supreme Court in 1818:

"This court is further of opinion, that when a civil war rages in a foreign nation, one part of which separates itself from the old established government, and erects itself into a distinct government, the courts of the union must view such newly constituted government as it is viewed by the legislative and executive departments of the government of the United States. If the government of the union remains neutral, but recognizes the existence of a civil war, the courts of the union cannot consider as criminal those acts of hostility, which war authorizes, and which the new government may direct against its enemy. In general, the same testimony which would be sufficient to prove that a vessel or a person is in the service of an acknowledged state, must be admitted to prove that a vessel or person is in the service of such newly erected government." (United States *v.* Palmer, 3 Wheaton, Supreme Court Reports, 610, 643.)

Consul of Spain v. *The Conception*, *1819.*—While the decision in this case was reversed in the case of *The Conception* (6 Wheaton [1821], 235), it was reversed on new evidence without which the decision would have been sustained. In the Circuit Court of South Carolina in 1819 it was said:

The indisputable fact known, to all the world, and recognized by our own executive in many official communications, of the existence of open, solemn war between Spain and an extensive and powerful colony, is enough to impose on us, as a nation, the duties of neutrality. The colony asserts, the social compact is violated

by the parent state, and the state of dependence or allegiance no longer existing. On this question an appeal is made to the god of armies, and no inferior tribunal ought to interfere. The colony claims from us no acknowledgment of her independence; she only demands of us to leave her in possession of what she can win by arms. Spain, unable to rescue by force, solicits our aid to seize, in violation of the rights of hospitality, the property that has been forced into our harbors; our duty is to lend our aid to neither, but to leave them as we find them, rigidly adhering to the duties of neutrality. This is not a piratical capture, and therefore not a case within the provisions of our treaty with Spain. It is a seizure in the exercise of the rights of war, not by one who wages war against the human race, but one who has singled out Spain for the sole antagonist. All seizures of property within our limits we are bound by that treaty to prevent, but the duty to restore is confined solely to the case of rescue from those whom we can recognize as pirates. In the case of Palmer and others, in the supreme court, the principles laid down by the chief justice excluded all idea that this was a piratical capture. It was then a seizure jure belli, and the rights of war are necessarily commensurate with the power of maintaining it openly and solemnly, more especially upon the high seas, the jurisdiction of which is not susceptible of that demarkation and appropriation which takes place on the land. This conflict has long been carried on between the colony and parent state. The event is at least doubtful. It is on both sides an assertion of a supposed existing right, and neither can claim, of a nation to whom their disputes are immaterial, any act of interference which may involve it in a contest with the victor. (Consul of Spain *v.* The Conception. [1819.] Fed. Case, No. 3137.)

Effect of declaration of blockade against insurgents.— As was held in the Civil War in the United States so it has been held since: the declaration of a blockade against insurgents by an established state gives to the insurgents the status of belligerents. This question has been raised repeatedly, as by Spain, to which Great Britain gave reply in 1874:

"Earl Granville to Mr. Layard.

"FOREIGN OFFICE, *February 13, 1874.*

"SIR: By your telegrams of the 2d instant you informed me of the publication, in the Madrid Gazette, of a decree declaring a blockade of the northern coast of Spain from Cape Penas to Fuentarrabia, with the exception of the ports of Gijon, Santander, and San Sebastian, such blockade to commence on the 20th instant.

"Her Majesty's government have taken this announcement into their serious consideration, and have consulted the law-officers of the Crown thereon.

"They are advised that, assuming the blockade to be effective, they must recognize the fact that it exists *de facto* and *de jure*. The result, however, will be that the Carlists henceforth become belligerents.

"Her Majesty's government presume that the parts of the coast to which the blockade is applied are in the hands of the Carlists, for the Madrid government cannot establish a municipal blockade of its own ports or coast, so as to entitle them to exercise on the high seas belligerent rights against foreign vessels.

"I have, therefore, to instruct you to warn the Spanish government that the establishment of the proposed blockade must lead to the issue by Her Majesty's government of a proclamation of neutrality.

"Your dispatches, No. 106, of the 2d, and No. 125, of the 6th instant, relative to the regulations under which the blockade, if established, is to be carried out, have been received. These regulations will be carefully considered by Her Majesty's government, and a further instruction will be sent to you with regard to them.

"The substance of this instruction has been sent to you by telegraph this day.

"I am, &c.,

GRANVILLE."

(Foreign Relations, U. S., 1874, p. 551.)

Simultaneous recognition of de facto government.— Insurrections or revolutions may for a time be successful and an established government may be overthrown. Whether the overthrow be permanent may be a matter of uncertainty, though in such cases the fact that the control of governmental affairs has passed from the former hands must be admitted in order that necessary relations may be maintained. This admission sometimes takes the form of the recognition of the party in control as the government de facto without any necessary implication that further action will follow. When, however, several states simultaneously grant recognition de facto, it may be fairly presumed that this is preliminary to complete recognition.

A military coup d'état was reported in Bolivia on July 12, 1920, and the junta taking over the government gave assurances that peace would be maintained, that the rights of foreigners would be respected and that treaty obligations would be observed.

A dispatch of July 17, 1920, from the Secretary of State to the American Minister in Bolivia stated:

"The Department desires you to keep it fully and closely informed of all developments in the situation, particularly those affecting the foreign policy of the Government now in control. You are instructed to take no action which could be construed as constituting recognition of the Provisional Government by the Government of the United States." (Foreign Relations, U. S., 1920., vol. I, p. 373.)

On July 20, 1920, a telegram from the American Minister reported that:

"Peru yesterday recognized new Government. Representatives here of all other countries unanimous in opinion that there should be no recognition now but unless something now unforeseen should occur in next few days provisional recognition of *de facto* Government with ample guarantees [to] foreigners and foreign interests pending holding of fair elections might be made. I feel that we should recognize the new Government as soon as possible but make it sufficiently provisional to provide for any changes which would be mainly in the personnel if at all." (Ibid., p. 374.)

The Secretary of State had said on the same date:

"The Department desires to impress upon you the necessity of exercising utmost discretion in communicating with revolutionary Government. Your dealing with Junta should be limited to entirely unofficial and informal intercourse, and you should confine your representations to questions affecting the interests of the United States and the security of American life and property, bearing in mind the fact that the Government of the United States has not as yet recognized the revolutionary Government as being even a *de facto* government." (Ibid., p. 374.)

Paraguay recognized the new government July 30, 1920, and the British Government planned to recognize the de facto government a week later unless the situation changed. Other states deemed it expedient to wait till after elections were held before taking action.

There was correspondence of representatives of the United States and other states in regard to recognizing the de facto government simultaneously. Recognition of a government by concurrent action may avoid confusion in some cases and will usually strengthen the position of the government recognized. By previous under-

standing the new government of Bolivia was recognized by the United States, Argentina, Chile and Brazil at 3 P. M., February 9, 1921.

Simultaneous recognition of Paraguay took place on March 14, 1936.

The American Chargé d'Affaires at La Paz on May 30, 1936, extended recognition to the Government of Bolivia, and Argentina, Brazil, Chile, Peru, Uruguay, and other American republics took similar action at the same time.

Joint delay in recognition.—In 1921, when affairs in Mexico were disturbed, there was much correspondence among foreign offices in regard to delaying recognition. The exchange of telegrams between the governments of the United States and of Belgium shows such delay:

"BRUSSELS, *November 4, 1921, 4 p. m.*
[Received November 5, 1:45 p. m.]

"48. Department's number 46, October 31, 1921. I have communicated with Jaspar, who has agreed not to extend recognition to the Obregon Government until such time as Great Britain, France, and the United States take such action. He states, however, that on account of the importance of Belgian interests in Mexico, the Government of Belgium would not want to be placed in a position of being the last to extend recognition, and therefore asks that when the time comes for any action looking toward recognition, such action be taken simultaneously. Do you think that an arrangement along these lines, which would solve Jaspar's perplexities, would be agreeable to the Department?

WHITLOCK"

"WASHINGTON, *November 9, 1921, 2 p. m.*

"47. Embassy's telegram number 48, November 4, 1921, 4 p. m. Inform the Minister of Foreign Affairs that we are highly pleased to learn that the Government of Belgium has agreed not to extend recognition to the Obregon Government until such time as Great Britain, France, and the United States take such action. You may give him assurance that when the time comes for any action looking toward recognition, this Government will be pleased to inform the Government of Belgium, to the end that such action be taken simultaneously." (Foreign Relations, U. S., 1921, vol. II, p. 438.)

Collective recall of recognition.—During the unsettled state of affairs in Costa Rica in 1919 there were propositions in regard to collective or joint action by the Central

American States. On July 7, 1919, the American Minister to Nicaragua reported to the Department of State from Managua by telegram:

"Nicaraguan Minister for Foreign Affairs informed me that he received a telegram from Salvadorean Minister for Foreign Affairs calling attention to the recent events that have taken place in Costa Rica and the gravity of the situation and the possibility of American intervention resulting therefrom, and the necessity of joint action of the Central American States to adopt some plan of action to bring about a solution of impending difficulties. Salvadorean Government requests the Nicaraguan Government to offer such suggestions as it may judge most convenient and expedient. Nicaraguan Government replied to the effect that it approves important step taken by Salvadorean Government and suggests that it take up the question with all Central American States; that the Nicaraguan Government adheres to the principles of the Washington convention of 1907 and therefore suggests that the respective Central American States proceed to recall their recognition of the Tinoco government; this should be done within the next 30 days. This done it would place the several Governments on an equal footing and then they could proceed to unite it formulating a plan of concerted action.

JEFFERSON."

(Foreign Relations, U. S., 1919, vol. I, p. 844.)

A Senate resolution asked why "Costa Rica, a belligerent with the Allies in the War just ended, was not permitted to sign the treaty of peace at Versailles." In a reply of August 16, 1919, the Secretary of State said:

"In view of the fact that the Government of the United States has not recognized the existence in the Republic of Costa Rica of a *de jure* or even a legitimately *de facto* Government, but holds that only the people of Costa Rica can as a moral force set up in that country a government constitutional in character and duly sanctioned by law, it follows naturally that the Government of the United States could not recognize as legally existent any manifestation of such a Government.

"To declare war is one of the highest acts of sovereignty. The Government of Costa Rica being for the Government of the United States legally nonexistent, it follows so far as the Government of the United States is concerned, no state of war could exist between Costa Rica and the Imperial German Government. Obviously there could be no question so far as this Government was concerned as to signing with Costa Rica the Treaty of Peace of Versailles.

"Respectfully submitted,

ROBERT LANSING."

(Ibid., p. 853.)

Restriction on declaration of war.—That a third state should interfere to prevent two other states from declaring war would be unusual. In 1921 the relations of Panama and Costa Rica were severely strained in dispute over a boundary line. This line had already been twice submitted to arbitration, once to the French Government (Loubet Award, Sept. 11, 1900, Foreign Relations, U. S., 1910, p. 786), and once to the Chief Justice of the United States (White Award, Sept. 12, 1914, Foreign Relations, U. S., 1914, p. 1000). Both these awards gave rise to controversies, and Panama and Costa Rica resorted to hostile action. This led the Secretary of State to telegraph at midnight, March 2, 1921, to the American Minister at Panama as follows:

"The Government of the United States has seen with the deepest regret the hostilities which have taken place between the armed forces of Panama and Costa Rica, from which loss of life has resulted, and which have caused public sentiment in both countries to be inflamed to a dangerous degree. It will be evident to the Government of Panama that this Government, by reason of its special interests in the Isthmus, could not but view with the gravest apprehension any developments which will disturb the peace and tranquillity of Central America. While the Government of the United States appreciates the assurances conveyed through you by the Government of Panama, the Government of the United States feels that a declaration of war because of a controversy growing out of the inability of the Republics of Costa Rica and Panama to agree upon a solution of the boundary dispute, would be inadmissible. The dispute is one, as pointed out in the Department's February 28, 2 p. m., which has already been examined during a period of years in the most disinterested and judicial manner, and it cannot but be evident that the only lasting solution which can be found will be reached as the result of the friendly offices of an impartial party to the controversy and not by hostilities of the character which have already taken place, which tend only further to excite the passions of the unruly element in the populations of both Republics." (Foreign Relations, U. S., 1921, vo. 1, p. 177.)

A similar dispatch was sent to the American Chargé in Costa Rica.

Both Central American governments were advised to withdraw their troops to the *status quo*, Cerro Pando-Punta Burica line, pending a final settlement. The

United States acting as mediator informed Panama that the American government regarded the Loubet award of territory on the Pacific to Costa Rica as just, and that under the treaty relations between the United States and Panama could not "permit a renewal of hostilities by Panama against Costa Rica by reason of Costa Rica's now taking peaceful possession of that territory" (Ibid, p. 226). Panama announced its intention to avoid giving cause for friction in this matter.

Recognition in general.—The term recognition is used in different senses.

Few, if any, problems arise when the term is used to designate the act by which one state takes notice of a change in another state, when the change is in accord with established or constitutional procedure. The succession of hereditary rulers may involve recognition of a new person in the position of authority, but no change in any other respect. In a government such as that of the United States, presidents succeed one another in a constitutional manner and a form of recognition is given by foreign states to this fact without involving any change in the identity or responsibility of the state itself. It was said in the case of the *Sapphire* in 1871:

> "The reigning sovereign represents the national sovereignty, and that sovereignty is continuous and perpetual resting in the proper successors of the sovereign for the time being." (11 Wallace, Supreme Court Reports, 164.)

The recognition by a state of a new political entity which has been formed in accord with the will of the party or parties within whose jurisdiction the area and population formerly were is a matter of policy and can give no offense. This was the case in recognition of states set up under terms of the Treaty of Versailles in 1920. Similarly recognition of a state by another state subsequent to recognition of the new political entity by the parent state, of which it had formerly been a part,

does not give rise to serious problems. The same may be said of recognition of a state formed by union of two or more states in accord with their own action.

Problems of recognition have arisen most frequently in connection with the attempts of groups, varying in nature and objective, seeking to break off from an established state or to supplant an existing government. The policies of recognition in such cases have varied in different states and at different times in the same state.

The changes in governments in Central and South American states during the nineteenth and early twentieth centuries afford many examples of recognition.

After the World War new problems arose in regard to recognition. These were numerous in the transition from the Russian Empire to the Union of Soviet Socialist Republics. In the case of the United States of America, sixteen years elapsed before recognition on November 16, 1933; but Russia did not recognize the United States after the Declaration of Independence for a period of thirty-three years, till 1809. In each case there was an apparent dislike of the system of government that had been established.

The failure of an established state to recognize by entering into diplomatic or other relations with a political entity does not necessarily predicate anything as to its existence.

The United States in the nineteenth century looked with favor upon the recognition of other American states setting up governments on a model similar to its own and favored complete separation from Europe. Recognition on the basis of de facto control of the political organization was common, particularly when this involved popular control.

Later willingness of the new entity to meet its obligations became a factor in granting recognition.

As relations became more close, the question of the legitimate character of a new government, as well as probable stability, were important considerations.

When a new state was set up by an international agreement of a general character, like some of the treaties of peace, recognition might follow without any implication as to the policy of the recognizing state.

Recognition of a new state or new government which by revolution succeeds a prior state may merely be recognition of an accomplished fact.

The admission that an organized body of armed men are seeking a political end in an established state may be essential for the peaceful conduct of relations between the insurrectionists and outside states. This does not imply any recognition of a political status of the insurrectionists but merely an accommodation to the facts.

Policy of the United States in 1870.—On November 16, 1870, the Spanish Cortes elected the Duke of Aosta King of Spain. In reporting this the American Minister stated that "The incidents of the session are not regarded as promising a tranquil reign nor even a peaceful accession to the throne." Referring to this communication, Secretary Fish said, December 16, 1870:

"It has been the policy of the United States to recognize the governments *de facto* of the countries with which we hold diplomatic relations. Such was our course when the republic was established in France in 1848, and again in 1870, and in each case accepted by the French people. Such was our course in Mexico when the republic was maintained by the people of that country in spite of foreign efforts to establish a monarchy by military force. We have always accepted the general acquiescence of the people in a political change of government as a conclusive evidence of the will of the nation. When, however, there has not been such acquiescence, and armed resistance has been shown to changes made or attempted to be made under the form of law, the United States have applied to other nations the rule that the organization which has possession of the national archives and of the traditions of government, and which has been inducted to power under the forms of law, must be presumed to be the exponent of the desires of the people, until a rival political organization shall have established the contrary. Your course in the present case will be governed by this rule.

"Should there be circumstances which lead you to doubt the propriety of recognizing the Duke of Aosta as King of Spain, it will be easy to communicate with the Department by telegraph and ask instructions. Should there be no such circumstances, the general policy of the United States, as well as their interests in the present relations with Spain, call for an early and cheerful recognition of the change which the nation has made." (Foreign Relations, U. S., 1871, p. 742.)

Late nineteenth century policy.—The attitude of the United States in the late nineteenth century was shown in instructions to diplomatic representatives in South America. The Acting Secretary of State wrote to the Minister as follows:

"Upon your return to your post, if you then ascertain that the provisional government of Bolivia being de facto administered by the junta according to regular methods, affording reasonable guarantees of stability and international responsibility, and without organized resistance, you will notify the junta that you are authorized by the President to enter into relations with the provisional government, and will notify the Department of your action in order that the President may make appropriate reply to the autograph letter addressed to him by the junta on the 26th of April last." (Foreign Relations, U. S., 1899, p. 107.)

Secretary Hay instructed the Minister to the Dominican Republic, October 19, 1899:

Upon your being satisfied that the new government of Santo Domingo is in possession of the executive forces of the nation and administering the public affairs with due regard for the obligations of international law and treaties, you will enter into full relations with it." (Ibid, p. 249.)

Panama, 1903.—A circular letter from the provisional government committee in Panama was received by the Consul General, November 5, 1903, 12:50 P. M., saying that the "Department of Panama withdraws from the Republic of the United States of Colombia and formed the Republic of Panama."

Secretary of State Hay sent the following telegram to the Consul General at 12:51 P. M., November 6, 1903:

"The people of Panama have, by an apparently unanimous movement, dissolved their political connection with the Republic of Colombia and resumed their independence. When you are

satisfied that a de facto government, republican in form, and without substantial opposition from its own people, has been established in the State of Panama, you will enter into relations with it as the responsible government of the territory and look to it for all due action to protect the persons and property of citizens of the United States and to keep open the isthmian transit in accordance with the obligations of existing treaties governing the relation of the United States to that territory.

"Communicate above to Malmros, who will be governed by those instructions in entering into relations with the local authorities." (Foreign Relations, U. S., 1903, p. 233.)

Seizure by insurgents.—Among the more firmly established states of the world there has been a growing tendency in the twentieth century to take a less liberal attitude toward insurgents endeavoring to overthrow or to supplant recognized states. Stability in governments has been regarded as an attribute to be favored, and frequent changes to be discouraged.

Many treaties have provided that only established courts shall be competent to pass upon matters of prize.

Seizure and detention by insurgents of vessels of states not recognizing the belligerency of the insurgents has been regarded as having no justification in law.

The statement of Mr. Wharton, when Solicitor in 1885, was detailed and covered the proposal of Colombia that insurgent vessels be treated as pirates:

"DEPARTMENT OF STATE, LAW BUREAU,
Washington, D. C., May 18, 1885.

"SIR: In my report of April 21, 1885, I stated as follows:

"(1) When vessels belonging to citizens of the United States have been seized and are now navigated on the high seas by persons not representing any Government or belligerent power recognized by the United States, such vessels may be captured and rescued by their owners, or by United States cruisers acting for such owners; and all force which is necessary for such purposes may be used to make the capture effectual.

"(2) The Government of the United States of Colombia is liable not only for any injury done by it or with its permission to citizens of the United States or their property, but for any such injury which by the exercise of reasonable care it could have averted; and it is also liable for damage done to such vessels when by reasonable care it would have averted such damage.

"This report was approved by the Secretary, and the company was duly informed thereof May 16, 1885. I have now before me,

under date of May 18, instant, a second application from the company, stating the unlawful seizure of two additional vessels by the insurgents by whom the seizure noticed in the prior report was made. I beg now to report that on this state of facts these steamers may be retaken by United States men-of-war and restored to their owners on the same principles as sustained the conclusion given to this effect in my prior report. Under all the circumstances of the case I now respectfully submit the following directions be given by the Secretary:

"First. That an instruction be sent to the United States minister at Bogata containing this and the prior report above mentioned.

"Second. That the papers in this case be immediately forwarded to the Secretary of the Navy, with the request that the vessels thus unlawfully seized and now possessed by the insurgents be retaken when on the high seas by any force the United States may be able to use for that purpose.

"In closing this report I beg to call attention to the following paragraph at the end of the recent dispatch from this Department as to the status on the high seas of vessels owned by the insurgents in question:

"'Secondly. The Government of the United States cannot regard as piratical vessels manned by parties in arms against the Government of the United States of Colombia, when such vessels are passing to and from ports held by such insurgents, or even when attacking ports in the possession of the National Government. In the late civil war the United States at an early period of the struggle surrendered the position that those manning the Confederate cruisers were pirates under international law. The United States of Colombia cannot, sooner or later, do otherwise than accept the same view. But, however this may be, no neutral power can acquiesce in the position now taken by the Colombian Government. Whatever may be the demerits of the vessels in the power of the insurgents, or whatever may be the status of those manning them under the municipal law of Colombia, if they be brought by the act of the National Government within the operation of that law, there can be no question that such vessels, when engaged as above stated, are not, by the law of nations, *pirates*; nor can they be regarded as pirates by the United States.'

"It will be seen, therefore, that the crews manning these vessels cannot be regarded by this Government as pirates. But while this is the case, and while it may be conceded that vessels seized by them on the high seas are seized under claim of right, yet, vessels belonging to citizens of the United States so seized by them may be rescued by our cruisers acting for the owners of such vessels in the same way that we could reclaim vessels derelict on the high seas.

"Respectfully submitted.

FRANCIS WHARTON, *Solicitor*."

(Foreign Relations, U. S., 1885, p. 212.)

Portugal, 1911.—In a telegram from the Secretary of State to the Chargé d'Affaires in Lisbon, June 6, 1911, it was stated:

"So soon as the Constituent Assembly, which meets on the 19th instant, shall have expressed the voice of the people and settled upon the form of government to be adopted by Portugal, you are instructed to inform the minister for foreign affairs of its official recognition by the Government of the United States of America. You will be prepared to do this if possible the same day that the Constituent Assembly takes definite and final action." (Foreign Relations, U. S., 1911, p. 690.)

Mexico, 1911.—In discussion of troubles in Mexico in the early second decade of the twentieth century, questions arose in regard to the nature of certain actions of armed bodies of men. Of these acts Secretary Knox, on June 17, 1911, said:

"Without desiring to enter into any discussion or controversy with your excellency regarding the status of persons who take up arms and make war under the circumstances recited in your note now under acknowledgment, I beg to suggest for your excellency's consideration that the movement in Lower California appears to be the result of the activities of a Mexican political party; that it is reported that the avowed object of this Mexican party is the throwing off of Mexican authority and the establishment of a socialistic republic in Lower California; and finally that the subversion of one form of government and the establishment of another has, upon this hemisphere, been uniformly regarded as a political movement entirely irrespective of the propriety or justice of the cause espoused." (Foreign Relations, U. S., 1911, p. 500.)

Mexico, 1913, 1915.—On February 28, 1913, explanations of the attitude of the United States toward recognition in Mexico were communicated to the American Ambassador:

"The Government of the United States is in de facto relations for the purpose of transacting all business with those in de facto control, who are the only effective authority in evidence. Whether the recent resignations under duress and the subsequent proceedings of the Mexican Congress suffice under the Mexican law to clothe the present regime with such de jure status as attached to the interim government of De la Barra is a question into which the Government of the United States is not now obliged to enter.

"A distinction may be drawn between de facto relations with a de facto government and formal recognition of such gov-

ernment, just as the same distinction may be drawn between de facto relations with and formal recognition of a normal and permanent Government. Formal recognition would in either case require some formal act of recognition, as, for example, the formal reply to a note announcing the new government or the receiving or accrediting of an ambassador. Any such formal act of recognition is to be avoided just at the present. In the meantime this Government is considering the question in the light of the usual tests applied to such cases, important among which are the question of the degree to which the population of Mexico acquiesce in and assent to the new regime and the question of disposition and ability to protect foreigners and their interests and to respond to all international obligations." (Foreign Relations, *Ibid.*, U. S., 1913, p. 748.)

The Secretary of State made it generally known on October 19, 1915, that General Carranza had been recognized as the Chief Executive of the *de facto* Government of Mexico, as follows:

"The Ambassadors of Brazil, Chile and Argentina, and the Ministers of Bolivia, Uruguay and Guatemala, who have been in conference with me in regard to the recognition of a government in Mexico, will, under instructions from their several Governments, recognize today the de facto Government of Mexico of which General Venustiano Carranza is the Chief Executive." (*Ibid.*, 1915, p. 771.)

The Secretary of State on the same day made known that the United States would accredit a diplomatic representative to the de facto government.

Peru, 1914.—A revolution in Peru, February 4, 1914, removed the President from office and placed executive authority in the hands of a Provisional Junta. A telegram from the Secretary of State to the American Minister on February 12, 1914, was as follows:

"The Junta created by the Congress being in uncontested exercise of executive power and such exercise being freely acquiesced in by the people, you are instructed to recognize the Junta as a Provisional Government pending the establishment of a permanent executive."

"BRYAN."

(*Ibid.*, 1914, p. 1063.)

Protectorate over Egypt, 1919.—In reply to a letter of Senator Owen, the Secretary of State said on December 16, 1919:

"Sir: I have the honor to acknowledge the receipt of your letter of November 29th last, in which your inquire as to the effect of this Government's recognition of the so-called protectorate proclaimed by Great Britain over Egypt on December 18, 1914.

"In reply I beg to state that the Department does not understand that Egypt was, prior to the British proclamation of December 18, 1914, in possession of full independent sovereign rights.

"The effect of this Government's qualified recognition of April, 1919, was to acknowledge with the reservation set forth at that time only such control of Egyptian affairs as had been set forth in the notice of the British Government transmitted to the Department on December 18, 1914, a copy of which is enclosed.

"It is assumed that it is the purpose of Great Britain to carry out the assurances given by King George the Fifth of England to the late Sultan of Egypt as published in the London *Times* of December 21, 1914.

"I have etc.

Robert Lansing."

(*Ibid.*, 1919, vol. II, p. 209.)

Recognition of World War states.—The recognition of states set up as a result of the World War is upon a basis wholly unlike that involved in recognition of a political unity based upon insurrection or belligerency. The new states set up by the Treaty of Versailles were given place in the family of nations when the provisions of the treaty came into effect and the responsibilities of state existence were embodied in a responsible government.

The creation of some of these states was due to action external to the area upon which the physical conditions of state existence rested and the political organization was externally determined for the area. An insurrection, however, has its origin within an existing state and in opposition to its control. The parent state may be reluctant to admit the existence of a new state in either case.

Sympathetic interest.—Just how far a favorable attitude of one state toward a party opposed to another established state may be made known is a matter of difference of opinion and may depend upon the strength and influence of the respective parties.

For sometime previous to January 1913, there had been disturbed conditions in the Dominican Republic. On January 15, 1913, the American Minister reported to the Secretary of State:

"President Nouel advised me this morning of a plot to gain possession of the fort here by prominent Horacista generals. Horacio Vasquez himself denounced the plot and offered to place himself and some of his followers in the fort to maintain order.

"The Archbishop [President Nouel] has for some time been urged arbitrarily to abolish the present Congress and make himself dictator. He has absolutely refused and is thinking of convoking Congress in extraordinary session to consider constitutional reforms and other matters.

"He expresses himself as despondent over the probabilities of success in his efforts for good government unless the Government of the United States takes an active part in controlling elections and the establishment of a government expressing the will of the people. He therefore requests me to obtain from you if possible a statement that can be made public as to the necessity of such a step on our part if the disorders of the past should tend to recur.

RUSSELL."

(Foreign Relations, U. S. 1913, p. 418.)

The Secretary of State replied:

"DEPARTMENT OF STATE,
"*Washington, January 22, 1913.*

"The following statement may be given to President Nouel as a message from me, to be made public if he sees fit:

" 'The most sympathetic interest is felt by the President and Government of the United States in your unselfish and patriotic efforts to maintain lawful and orderly government and to introduce needful reforms, thus assuring to the Dominican nation the blessings of prosperity and peace. The President and Government of the United States sincerely wish that your patient endeavors may so succeed as to exclude the possibility of a recurrence of such disorders as have afflicted the Dominican people. Those disorders would by their recurrence make more onerous the duty of the United States under its conventional and moral obligations never to be indifferent to the peace and order of the Dominican Republic.'

"You will do everything in your power to hold up the hands of the President, Archbishop Nouel, and to impress him with the necessity of patiently continuing in office. It would be well to advert in your conversations to the fact that under the present electoral law it is apparently almost impossible to accomplish much in the direction of free elections, however willing the Government of the United States might be to lend its aid; and that as a prerequisite to free elections it would seem indispensable to provide some form of previous registration and some form of voting

that would prevent fraud. You might also suggest in informal conversation that besides the electoral law other reforms seem to the Department to be urgently needed, and that these might possibly be accomplished without reform of the Constitution. For instance, reform of the laws relating to provincial and communal governments, the law of conscription (so as to provide for an annual enlistment by lot instead of at the will of local military chiefs), and the creation of a right to question arrest by means of habeas corpus or other such proceedings.

"You might also point out to the President how much easier it would be for the United States to lend its aid if necessary to assist in the conduct of free and orderly elections if such reforms were realized.

KNOX."

(Ibid, p. 419.)

Under date of September 12, 1913, Secretary Bryan set forth his policy under the Convention of 1907:

"Firm in its intention to cooperate with the legally constituted Government in order that revolutionary activity may cease, the Department of State makes known to the revolutionists and those who foment revolutions the following:

"Under the Convention of 1907, the Dominican Republic cannot increase its debt without the consent of the United States of America, and this Government will not consent that the Dominican Government increase its debts for the purpose of paying revolutionary expenses and claims. Moreover, this administration would look with disfavor on any administrative act that would have for its object increase of the taxes, thereby imposing a burden upon the people, for the purpose of satisfying revolutionists. And should the revolution succeed, this Government, in view of the President's declaration of policy, would withhold recognition of the de facto government, and consequently withhold the portion of the customs collections belonging to Santo Domingo as long as an unrecognized de facto government should exist." (Ibid, p. 427.)

Civil strife and belligerent cruiser.—In 1915 while Liberia was neutral, a British cruiser, the *Highflyer*, reported to the President of Liberia that it had come to Monrovia to offer assistance in civil disturbances then prevailing. An American vessel of war had been requested by Liberia and the vessel had been sent.

On October 19, 1915, the American Chargé at Monrovia reported:

"The British *Highflyer* arrived Monrovia yesterday. Informed that Commander states to President he was ordered here by British Government to offer Liberian Government assistance in Kru

disturbances until arrival *Chester*. Liberian Government, having appealed to the Government of the United States for aid, prefers not to avail itself of British assistance except so advised by the Government of the United States. Disturbances unabated but measures already taken deemed sufficient to hold situation until *Chester* arrives November 1. Liberian Government awaits Department's advice before answering Commander." (Foreign Relations, U. S., 1915, p. 629.)

The Secretary of State then communicated with the American Ambassador at London, who immediately replied:

"DEPARTMENT OF STATE,
Washington, October 20, 1915.

"2312. Legation, Monrovia, advises that British cruiser *Highflyer* arrived Monrovia October 18. Commander informs President of Liberia that he was ordered there to offer assistance in quelling uprising of native Krus until arrival of American naval steamship *Chester* due about November 1. Department informed measures already adopted deemed sufficient to hold disturbances in check until arrival *Chester* and Liberian Government, while deeply appreciative courteous offer, feels that its position of neutrality would be violated by *Highflyer* remaining in Liberian water more than twenty-four hours. Take case up immediately with British Government. Cable reply. Department has communicated orally with British Embassy here.

LANSING."

"AMERICAN EMBASSY,
London, October 21, 1915.

"3070. Your 2312, October 20. The British Government has telegraphed its Consul General at Monrovia to instruct the commander of the *Highflyer* to depart immediately unless disorder demands its presence.

AMERICAN AMBASSADOR."

(Ibid., p. 630.)

Poland, 1919.—On January 22, 1919, the American Commission to Negotiate Peace sent to the Acting Secretary of State the following in regard to the Provisional Polish Government:

"Acting under direction from the President, I have sent the following telegram to Mr. Paderewski which gives full recognition to the Provisional Polish Government. In view of the necessity of immediate action I did not send the communication through the Department as I would normally do.

"Following is the message:

" 'The President of the United States directs me to extend to you as Prime Minister and Secretary for Foreign Affairs of the

Provisional Polish Government his sincere wishes for your success in the high office which you have assumed and his earnest hope that the Government of which you are a part will bring prosperity to the Republic of Poland.

"'It is my privilege to extend to you at this time my personal greetings and officially to assure you that it will be a source of gratification to enter into official relations with you at the earliest opportunity. To render to your country such aid as is possible at this time as it enters upon a new cycle of independent life, will be in full accord with that spirit of friendliness which has in the past animated the American people in their relations with your countrymen.'" (Foreign Relations, U. S., 1919, vol. II, p. 741.)

Yugoslavia, 1919.—The American Commission to Negotiate Peace communicated the following to the Acting Secretary of State on February 6, 1919:

"The Secretary of State will give out on February 7th the following statement in regard to the union of the Jugo Slav peoples, which you may give out to the press immediately:

"'On May 29, 1918, the Government of the United States expressed its sympathy for the nationalistic aspirations of the Jugo Slav race and on June 28 declared that all branches of the Slavish race should be completely freed from German and Austrian rule. After having achieved their freedom from foreign oppression the Jugo Slav [s] formerly under Austro-Hungarian rule on various occasions expressed the desire to unite with the Kingdom of Servia. The Servian Government on its part has publicly and officially accepted the Union of the Serb, Croat and Slovene peoples. The Government of the United States, therefore, welcomes the union while recognizing that the final settlement of territorial frontiers must be left to the Peace Conference for determination according to desires of the peoples concerned.'" (*Ibid.*, p. 899.)

The designation "Yugoslavia" became official in preference to "Kingdom of Serbs, Croats and Slovenes" by decree of October 3, 1929.

Aid to established state.—Aid may be of various descriptions and for differing reasons. States already established usually wish to maintain the *status quo*. Sometimes there may be economic or other reasons for such a wish. Of course, if one state is in debt to the nationals of another state, the second state will be interested in the maintenance of the economic stability of the debtor state.

Sometimes a friendly attitude may be interpreted to imply more than had been originally intended.

In a somewhat involved statement of the Nicaraguan Minister to the Secretary of State of the United States, August 24, 1921, it was said:

"The Government of Nicaragua placing confidence in the loan contracts made sometime ago with the banking concerns of Brown Brothers and Company and J. & W. Seligman and Company of New York, with the friendly assistance of the Government of the United States, under which contracts the collection of the customs duties of the Republic was turned over to a Receiver General appointed by the Government of Nicaragua and nominated by the Government of the United States through which contracts and through the financial plan which was set up in Nicaragua in accord with the Government of the United States, for the purpose of placing its public finances upon a substantial basis and thus promoting its progress and prosperity, for which purpose its general estimates were also kept within the amounts that were indispensable for the conduct of the Government, aiming to carry out the objects that have been aimed at and relying at the same time on the declarations of the Department of State that it would not brook any armed intervention against the Government of Nicaragua that would unavoidably be attended with the consequence of throwing its budget out of balance and making it impossible to meet its obligations, for which Your Excellency's Government stands as the friendly mediator, the Government of Nicaragua has omitted for eight years to keep its war stores on the proper footing and being at this juncture without available funds that would provide these without a very serious upset in the discharge of its obligations, my Government wishes to be supplied by Your Excellency's Government from the stores left over from the world war and to be paid for according to such arrangements as may be agreed to, the implements that may not be in use and hereinbelow described:

Five thousand rifles.

Three million cartridges for rifles.

25 machine guns.

250 thousand rounds for machine guns.

2 military aeroplanes, with their regulation supply of ammunition and indispensable spare parts." (Foreign Relations, 1921, vol. II, p. 565.)

When the Secretary of War raised with the Secretary of State the question of general policy of the sale of arms, the Secretary of State replied that each request for the purchase of arms should be considered separately and according to its particular merits:

"With regard to the particular case under discussion, I am inclined to think that the sale of the arms requested by Nicaragua would be desirable from the point of view of this Department, in view of our special interest in the maintenance of stable government in that country, and in view of our participation in the supervision of the financial affairs of the Republic. I am informed that Nicaragua has not at the present time sufficient war material to deal effectively with revolutionary bands which have been operating in the northern part of the Republic, and I consider it very desirable that the Government should be placed in a position where it will be able to maintain order." (Ibid., p. 569.)

Closure of ports.—An established state may close its ports in time of war to vessels of war of the belligerents or it may prescribe the conditions of entrance and sojourn. In absence of proclamation the 24-hour rule of sojourn generally prevails.

The Institute of International Law in the session of 1910 stated that a neutral state is free to close or to open its ports to vessels of war of the belligerents engaged in the contest.

During the World War neutral states closed their ports within a given area to all vessels of war, closed some ports as war ports or naval areas, closed many ports except during specified hours, regulated or forbade the entrance of certain classes of vessels, and made other regulations.

The principle that a neutral state may regulate or prohibit the use of its ports by vessels of war seems to be generally accepted.

Soviet governments and recognition.—After the abdication of Czar Nicholas II, March 15, 1917, a provisional government was established with a provisional ministry headed by Kerensky. The United States through its ambassador formally recognized this new government on March 22, 1917.

The Bolsheviki overthrew this new government in November. The aim of the Bolsheviki was to set up a dictatorship of the proletariat involving a complete social and economic revolution with the abolition of private

property and repudiation of prior international obligations.

Partly from domestic party political pressure, Great Britain (February 1), Italy (February 7), and France (October 28) recognized the Union of Soviet Socialist Republics in 1924. Some neighboring states had previously recognized the U. S. S. R. The Ambassador of the Provisional Government of Russia remained in Washington in that capacity till the middle of 1922.

The method of recognition of the Union of Soviet Socialist Republics varied. Great Britain, France, Norway, Sweden, and Denmark recognized by formal notes. Germany, Austria, Italy, Japan, and other states made treaties or established diplomatic relations.

Case of Oetjen v. *Central Leather Co.*, 1918.—The Supreme Court of the United States on March 11, 1918, said, when the question of the status of a revolutionary government was involved:

"It is also the result of the interpretation by this court of the principles of international law that when a government which originates in revolution or revolt is recognized by the political department of our government as the *de jure* government of the country in which it is established, such recognition is retroactive in effect and validates all the actions and conduct of the government so recognized from the commencement of its existence. *Williams* v. *Bruffy*, 96 U. S. 176, 186; *Underhill* v. *Hernandez*, 168 U. S. 250, 253. See *s. c.* 65 Fed. Rep. 577.

"To these principles we must add that: 'Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.' *Underhill* v. *Hernandez*, 168 U. S. 250, 253; *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347.

"Applying these principles of law to the case at bar, we have a duly commissioned military commander of what must be accepted as the legitimate government of Mexico, in the progress of a revolution, and when conducting active independent operations, seizing and selling in Mexico, as a military contribution, the property in controversy, at the time owned and in the possession of a citizen of Mexico, the assignor of the plaintiff in error. Plainly this was the action, in Mexico, of the legitimate Mexican

government when dealing with a Mexican citizen, and, as we have seen, for the soundest reasons, and upon repeated decision of this court such action is not subject to reexamination and modification by the courts of this country.

"The principle that the conduct of one independent government cannot be successfully questioned in the courts of another is as applicable to a case involving the title to property brought within the custody of a court, such as we have here, as it was held to be to the cases cited, in which claims for damages were based upon acts done in a foreign country, for it rests at last upon the highest considerations of international comity and expediency. To permit the validity of the acts of one sovereign State to be reëxamined and perhaps condemned by the courts of another would very certainly 'imperil' the amicable relations between governments and vex the peace of nations.'" (*Oetjen* v. *Central Leather Co.*, 246 U. S. 297.)

This principle has been reaffirmed in other American cases and also in cases before the English Courts.

In the case of *Princess Paley Olga* v. *Weisz* in 1929, Scrutton, L. J., said:

"The United States, situate in the neighbourhood of South and Central American Republics, where the life of any Government is precarious and its death rarely by natural causes, frequently found in its territory property seized by a revolutionary force which ultimately succeeded in establishing itself in power and there sold the goods it had seized to persons who exported them to the United States, where they were claimed by their original owners. In *Oetjen* v. *Central Leather Co.* (2) these facts occurred with reference to a seizure in Mexico of property of a Mexican citizen which when sold came into the United States, and in *Ricaud* v. *American Metal Co.* (3) they occurred again with respect to the property of a citizen of the United States." ([1929] 1 K. B., 718.)

Revolution in Spain, 1936.—During the period of civil strife in Spain many problems arose in regard to the treatment of foreign property. In an instruction of the Department of State of the United States delivered to the Spanish Government on August 5, 1936, it was stated in behalf of the United States that:

"This Government cannot admit that private property, whether in the hands of American nationals or abandoned by them temporarily because of conditions over which they have no control, may be interfered with with impunity or denied the protection to which it is entitled under international law. This Government must, of course, look to the Government of Spain for the protec-

tion of such property and for indemnification for any delinquency in this respect.

"In the event of requisition for the necessities of war or otherwise of American property this Government must insist that provision be made for prompt and full compensation to the owners." (Department of State. Press Release. Vol. XV, p. 131.)

When it was reported on August 30 that an aircraft had dropped bombs near the United States destroyer *Kane*, the Secretary of State on the same day in a statement said:

"Since both the Government forces and the opposing forces in Spain, in the friendliest spirit, have made every possible effort to avoid injury to American nationals and American property, it can only be assumed that the attack on the United States destroyer *Kane* was due to its identity having been mistaken by a plane of one faction for a vessel of the other.

"Because of this friendly attitude and the absence of any motive whatsoever to attack an American vessel, it is not conceivable that either a Spanish Government plane or an insurgent plane would knowingly make attack upon an American naval vessel. The Secretary of State, at the direction of the President, immediately brought this incident to the attention of the Spanish Government, through the American Embassy at Madrid, and to General Francisco Franco, informally through the American consul at Seville, with the request that both sides issue instructions in the strongest terms, as the American Government feels confident they will desire to do, to prevent another incident of this character, it being well known in every quarter that the sole purpose of the presence of American naval vessels about the Spanish coast is to afford facilities for the removal of American nationals from Spain." (Ibid., p. 193.)

The Secretary of State also instructed the American Embassy that:

"Since the plane making the attack was unidentified the President has directed that this incident be brought to the attention of the Spanish Government, through you and informally, with no intention as to recognition, to the attention of General Franco through the American Consul at Seville, with the request that both sides issue instructions in the strongest terms, as the American Government feels confident they will desire to do, to prevent another incident of this character.

"Take up this matter immediately with the Spanish Government in the sense of the foregoing, and endeavor to obtain a categorical statement as to whether the plane making this attack was a Government plane, and urge and insist upon definite assurance that appropriate instructions will immediately be issued to

the Government armed forces. Telegraph immediately and fully results of your representations." (Ibid., p. 202.)

Résumé.—In the statement of Situation I states X, A and B have recognized the insurrectionists against state Y, the Yotists, as state Yota. State X had previously given unofficial aid and shown sympathy for the Yotists. Other states than X, A and B, have not recognized the Yotists as a state, though the insurgency of the Yotists is admitted.

The exact time at which a body of insurgents becomes a state before the parent state has recognized them as such is not settled. If the parent state grants recognition, the sovereignty of the parent state terminates at the time of the grant and the insurrectionists, so far as the parent state is concerned, become independent. The responsibility of the parent state for the acts of the insurrectionists terminates with this recognition. For foreign states granting the insurrectionists recognition as a state, the date would be determined by that of recognition.

States A, B, and X, therefore, cannot hold state Y responsible for any acts of the recognized state Yota, and Yota may carry on war under the accepted rules so far as states A, B, and X are concerned and the aircraft of Yota would after declaration of war be treated according to the rules of war and neutrality.

It is generally accepted that a declaration of war by a state creates a state of war as between it and the party against which the war has been declared. The parent state in time of insurrection is also under obligation to respect the laws of war. Prior to the recognition of the belligerency or statehood of insurgents by the parent state, non-recognizing states though admitting the fact of insurrection and accommodating themselves thereto might be regarded as assuming an unfriendly attitude toward the parent state if they accorded to the insur-

gents the full rights of belligerents. It would, therefore, become a question of policy as to what attitude a state might take toward an insurgent party not recognized by it or the parent state as a belligerent or as a state. The fact that three states have recognized insurgents as a state prior to recognition by the parent state puts other states under no obligation to treat the insurgents as belligerents or as a state. The fact, that the party admitted by all states other than three to be insurgents issues a declaration of war against a non-recognizing state, does not change the legal relationships of other non-recognizing states. To grant any other conclusion would be to encourage insurrections and declarations of war by parties not considered as having attained responsible political status. There would be no obligation upon non-recognizing states to submit to seizure of its merchant vessels by unrecognized belligerents, nor would the non-recognizing states, even if themselves at war, be under obligations to submit to restrictions in the use of ports not imposed by established states, though there might be risk when insurgents declare war and are able by force to maintain the declaration which has been published. If the ports are those of a recognized state, the regulations of that state prevail.

SOLUTION

(*a*) 1. The naval and aircraft of Yota and of C are to be treated by states B and D as naval and aircraft of belligerents, though Yota would not be regarded as a state by state D.

2. The recognition of Yota as a state by Y entitles the naval and air craft of Yota to the same treatment as the naval and aircraft of state C in all neutral ports.

(*b*) The cruiser of state D may, outside the jurisdic-

tion of a foreign state, demand and use necessary force to rescue the merchant vessel of D.

(*c*) State E, not having recognized the Yotists as a state, are not bound to respect the declaration of closure, though state E must take into consideration the risk involved in disregarding the declaration.

SITUATION II

VISIT BY AND INTERNMENT OF AIRCRAFT

States X and Y are at war. Other states are neutral.

(*a*) The *Yaga*, a cruiser of state Y, launches a plane, the *Ya–10*, which locates a merchant vessel of state X, the *Xala*, on the high seas and by radio orders the *Xala* to proceed to the *Yaga*. The *Xala* gives no evidence of receiving the message.

1. The *Xala* starts zigzagging in the opposite direction.

2. The *Xala* stops and remains stopped.

3. The *Xala* apparently knows that a cruiser of X is approaching, and the cruiser can be seen from the *Ya–10*.

What should be the action of the *Ya–10*, if each of the above supposed conditions arise?

4. Would the same action be taken under identical conditions in the case of the *Nela*, a merchant vessel of neutral state N?

(*b*) What should be the action of *Ya–10*, if the same orders had been in a message dropped on the deck and picked up by an officer of the respective merchant vessels?

(*c*) A carrier-based plane, *Pa–11*, of state Y is engaged in operations against state X.

1. The *Pa–11* is pursued by an aircraft of state X and is flying within three miles of state K. The aircraft of state X is over the high sea. State K has prohibited the flying of belligerent aircraft within its juris-

diction, and a patrol vessel and an aircraft of state K are near.

2. The *Pa–11* enters port N of state O in order to take fuel from a naval tanker of state Y.

3. The *Pa–11* enters port P of state R and alights on the *Yema*, an aircraft carrier, which entered port P two hours earlier and from which the *Pa–11* had flown three hours before the *Yema* entered the territorial waters of state R.

What action may the neutral authorities lawfully take?

SOLUTION

(*a*) 1. The *Ya–10* should not use force against the *Xala* till certain that the *Xala* has received and understood the summons. When certain that summons has been received and is understood, the *Ya–10* may use force sufficient only to bring the *Xala* to the *Yaga* under escort, or in case of persistent or active resistance the *Ya–10* may sink the *Xala*, after assuring the safety of passengers, crew, and papers.

2. The *Ya–10* should not use force against the *Xala* till certain that the *Xala* has received and understood the summons. When certain that summons has been received and is understood, the *Ya–10* may use force sufficient only to bring the *Xala* to the *Yaga* under escort, or in case of persistent or active resistance the *Ya–10* may sink the *Xala*, after assuring the safety of passengers, crew, and papers.

3. The *Ya–10* should not use force against the *Xala* till certain that the *Xala* has received and understood the summons. When certain that summons has been received and is understood the *Ya–10* may use force sufficient only to bring the *Xala* to the *Yaga* under escort. If the *Ya–10* decides not to incur risk from the

approaching cruiser of X, the *Ya–10* may take no further action in regard to the *Xala*.

4. If a merchant vessel of neutral state N, the *Nela*, should be summoned by the *Ya–10* under conditions identical to (1), (2), and (3) above, the same action may be taken.

(*b*) The commander of the *Ya–10* being already certain that the summons is received, should also be certain that it is understood, when he may proceed as in (1), (2), (3), and (4) above.

(*c*) 1. State K should use due diligence to intern the *Pa–11*, an aircraft of state Y.

2. State O should use due diligence to intern the *Pa–11*, an aircraft of state Y, and if the tanker of state Y has furnished fuel to the *Pa–11*, should intern the tanker.

3. State R should request the *Yema* to turn over the *Pa–11* for internment and if the request is not granted, should use due diligence to intern the *Yema* with the *Pa–11* on board.

NOTES

Changing rules.—New methods of warfare introduce new problems. It is not usually the case that the rules for the use of new methods are adopted in advance. It also requires some knowledge of the manner in which the new method works before suitable rules may be devised.

In spite of the novelty of a new instrument of war, the principles of its use may be well established. Many of the principles embodied in "Lieber's Code" (General Orders No. 100, Instructions for the Government of Armies of the United States in the Field, 1863,) are illustrative of rules previously existing, which in the form given by Lieber are, with few modifications, continuing to the present day. The principles of the law of maritime war stated by Lord Stowell early in the nineteenth century were regarded as binding in courts of

the twentieth century. Some of these principles were disregarded during the World War, though often the arguments put forth for disregarding early precedents were not valid.

Such principles as that the use of materials which cause unnecessary suffering should be prohibited were regarded as of universal acceptance. That poison should be prohibited was generally approved. The reason for prohibiting the discharge of projectiles from balloons in the late nineteenth century was largely lack of effective control in directing the movements of the aircraft. This would make the aim and course of the projectiles uncertain and create an undue risk for innocent population. As aircraft became perfected and their movements could be reasonably controlled, the restrictions upon their use correspondingly changed.

The argument sometimes advanced to the effect that because an instrument of war is weak in respect to defense, it is entitled to special consideration either from the enemy or from a neutral, certainly has not received much support. War is a contention of strength and if either belligerent uses instruments which are weak, not self-sufficient, or to which the belligerent cannot furnish adequate support, such instrument is not entitled to exceptional consideration from the neutral, and will not receive it from the opposing belligerent.

Air power.—As there is great difference of opinion as to "war as an instrument of national policy", so there is wide difference as to the use of an air force in war. Certainly the use of the air has modified the conduct of war, even though opinion is not uniform as to what extent and in what respects modification has taken place and must take place. There is not agreement either as evidenced in discussion of or in appropriations for air equipment.

In some early wars land forces have been the main and determining factor, in others surface sea power, in the World War for a time subsurface sea force was threatening to dominate, and now air force is an incalculable factor, but uncertainty as to the issue is often a stimulus to war.

Gunpowder, torpedoes, mines, and submarines have at different periods in history been hailed as the last word in war, as aircraft are now considered by some.

Thus far in history man as an animal of many inventions has shown a defensive mentality commensurate to the offensive, though sometimes a little delayed.

Aircraft.—The introduction of aircraft as a means of warfare greatly modified the conduct of war upon the earth surface, on the water as well as on land. The earlier rules for warfare were concerned with surface combat. These rules could not in every instance be extended by analogy to aerial warfare, because the forms of warfare were not analogous. There was an attempt on the part of some writers to extend the three mile maritime jurisdiction doctrine to the superjacent air. In this attempt the early recognition of the fact that the law of gravity did not act horizontally and vertically in the same manner destroyed the analogy. Differences in speed and in other respects introduced other complications in attempts to extend maritime and land rules to the air. Aircraft were coming more and more to be used in war; therefore rules had to be devised.

The World War experiences and problems contributed valuable basal data for the determination of the nature of possible regulation of use of aircraft. The equipment of aircraft with radio introduced other problems.

Hague limitations on aerial warfare, 1899, 1907.—At times there have been movements advocating the prohibition of aerial warfare or of the use of aircraft in war except for purposes of observation and signaling.

While other restrictions were advocated as aircraft became more perfected, there was little limitation upon the object for which the aircraft might be used, but some restriction upon the method of use was demanded in order that there might not be a risk disproportionate to the advantage. It might be reasonable to restrict the use of certain specified agencies in war for a time until their operation could be better known, and it might be essential to prohibit the use of other instrumentalities immediately.

While the principle that the use in war of instruments or materials that would cause unnecessary suffering should be prohibited might meet general support in an international conference, it is not certain that an instrument, which at a given date would be in the category of those which might cause unnecessary suffering, would remain in that category. At the Hague Conference of 1899 certain types of bullets were prohibited, and it was also proposed to prohibit the discharge of projectiles from balloons. In discussing this proposal Captain (General) Crozier, of the American Delegation, said:

"The general spirit of the proposals that have received the favorable support of the subcommission is a spirit of tolerance with regard to methods tending to increase the efficacy of means of making war and a spirit of restriction with regard to methods which, without being necessary from the standpoint of efficiency, have seemed needlessly cruel. It has been decided not to impose any limit on the improvements of artillery, powders, explosive materials, muskets, while prohibiting the use of explosive or expanding bullets, discharging explosive material from balloons or by similar methods.

"If we examine these decisions, it seems that, when we have not imposed the restriction, it is the *efficacy* that we have wished to safeguard, even at the risk of increasing suffering, were that indispensable.

"Of the two cases where restrictions have been imposed, the first, the prohibition of making use of certain classes of bullets, proceeds exclusively from a humanitarian sentiment, and it is therefore reasonable to suppose that the second has its basis in such a sentiment. Now, it seems to me difficult to justify by a humanitarian motive the prohibition of the use of balloons for

the hurling of projectiles or other explosive materials. We are without experience in the use of arms whose employment we propose to prohibit forever. Granting that practical means of using balloons can be invented, who can say that such an invention will not be of a kind to make its use possible at a critical point on the field of battle, at a critical moment of the conflict, under conditions so defined and concentrated that it would decide the victory and thus partake of the quality possessed by all perfected arms of localizing at important points the destruction of life and property and of sparing the sufferings of all who are not at the precise spot where the result is decided. Such use tends to diminish the evils of war and to support the humanitarian considerations which we have in view.

"I do not know of machines thus efficient and thus humanitarian, in the incomplete stage of development in which aerostation now is; but is it desirable to shut the door to their possible introduction among the permitted arms? In doing so, would we not be acting entirely in the dark, and would we not run the risk of error inherent in such a manner of procedure? The balloon, as we know it now, is not dirigible; it can carry but little; it is capable of hurling, only on points exactly determined and over which it may pass by chance, indecisive quantities of explosives, which would fall, like useless hailstones, on both combatants and noncombatants alike. Under such conditions it is entirely suitable to forbid its use, but the prohibition should be temporary and not permanent. At a later stage of its development, if it be seen that its less desirable qualities still predominate, there will still be time to extend the prohibition; at present let us confine our action within the limits of our knowledge.

"That is why I have the honor to propose the substitution of the following text for the text already voted:

" 'For a period of five years from the date of the signature of this act it is forbidden to employ balloons or other similar means not yet known for the purpose of discharging projectiles or explosives.' " (Proceedings of the Hague Peace Conference, 1899. Carnegie Translation, vol. III, p. 354.)

On July 29, 1899, a Declaration was signed to the following effect:

"The Contracting Powers agree to prohibit, for a term of five years, the discharge of projectiles and explosives from balloons or by other new methods of a similar nature." (32 Stat. 1839.)

By its provisions this Declaration would terminate on July 29, 1904. This was during the Russo-Japanese War. Both Russia and Japan observed the provisions of the Declaration, however, to the end of the war. When it was proposed at the Second Hague Conference in 1907 to renew this declaration, M. Louis Renault, the able delegate from France, said:

"The method of discharging the projectiles makes little difference. It is lawful to try to destroy an arsenal or barracks whether the projectiles used for this purpose comes from a cannon or from a balloon; it is unlawful to try to destroy a hospital by either method. That, in our minds, is the essential idea to be considered. The problem of aerial navigation is progressing so rapidly that it is impossible to foresee what the future holds for us in this regard. One cannot, therefore, legislate with a thorough knowledge of the question. One cannot forbid in advance the right to profit by new discoveries which would not in any way affect the more or less humanitarian character of war and which would permit a belligerent to take effective action against his adversary, while respecting the requirements of the Hague Regulations." (Proceedings of the Hague Peace Conference, 1907. Carnegie Translation, vol. III, p. 147.)

At the Second Hague Peace Conference, 1907, it was also proposed by the Italian and Russian delegations to make restrictions requiring dirigibility of aircraft which might drop projectiles. The form was as follows:

"It is forbidden to throw projectiles and explosives from balloons that are not dirigible and manned by a military crew.

"Bombardment by military balloons is subject to the same restrictions accepted for land and sea warfare, in so far as this is compatible with the new method of fighting." (Ibid., p. 28.)

There was only about a two-third vote of the membership of the Conference in support of either proposal. It was also stated that

"On account of the distinct character of its two articles, the German delegation asked that they be separated, observing, as regards the first, that it was possible to throw projectiles from nondirigible balloons, and further, that there was no connection between the power to direct balloons and that of throwing projectiles from them." (Ibid.)

In discussing the Italian-Russian proposal it was set forth that the 1899 Declaration in regard to discharge of projectiles from balloons reflected the uncertainty existing at the time in regard to the use of balloons and that with light and powerful motors in prospect in 1907 it would be futile to try to limit the lawful use of aircraft.

The Second Hague Peace Conference of 1907 proposed in its Final Act:

"The Contracting Powers agree to prohibit, for a period extending to the close of the Third Peace Conference, the discharge of projectiles and explosives from balloons or by other new methods of a similar nature."

The only change from the 1899 Declaration was in fixing a period to the close of the Third Peace Conference which was projected for 1915, at which time the World War was in progress. As the Declaration was not generally ratified, it has since 1907 received little consideration.

Rule on submarines.—During the World War, 1914–18, the submarine was for the first time extensively used. Claims were made that it should not be required to conform to rules long accepted for warfare upon the sea, that as it could not take on board the passengers and crew of a visited vessel, it might dispense with visit, and torpedo a vessel without even summoning the vessel. The structure of the submarine is relatively light and not suitable for defense against projectiles. The submarine is also relatively slow and relies upon its underwater protection for effectiveness. It is now agreed that the submarine does not for this reason have any special rights in war. The London Naval Treaty of 1930, Part IV, Article 22 provides:

"The following are accepted as established rules of International Law:

"(1) In their action with regard to merchant ships, submarines must conform to the rules of International Law to which surface vessels are subject.

"(2) In particular, except in the case of persistent refusal to stop on being duly summoned, or of active resistance to visit or search, a warship, whether surface vessel or submarine, may not sink or render incapable of navigation a merchant vessel without having first placed passengers, crew and ship's papers in a place of safety. For this purpose the ship's boats are not regarded as a place of safety unless the safety of the passengers and crew is assured, in the existing sea and weather conditions, by the proximity of land, or the presence of another vessel which is in a position to take them on board." (46 Stat. (Pt. 2), 2858.)

This principle was more widely accepted in 1936 as the French and the Italian Governments deposited their

ratifications of Part IV with the British Government on November 6, 1936. In a protocol of the same day, the states parties to Part IV, from that time, the United States, Australia, Canada, France, Great Britain and Northern Ireland, India, Irish Free State, Italy, Japan, New Zealand, and South Africa, requested the British Government to communicate the rules to all the Powers not signatory to the Treaty of London with an invitation that they accede to Part IV "definitely and without limit of time."

Rules on aircraft.—Thus there have been from time to time suggestions that aircraft, because of the nature of their construction, the space in which they operate, their speed, and other considerations, be given special exemptions. For a time the doctrine of freedom of the air was a slogan meaning the freedom of all air. Then this freedom was claimed by some for air above a certain zone in all areas. Now by many agreements it is conceded that freedom of the air does not extend outside the limits of the air above the high seas and some contend that as elevation enlarges the range of vision the jurisdiction of the coast state should be extended to a corresponding degree.

There has been a claim that the speed of aircraft and their weakness should give to them special privileges in time of war. The aircraft gains from speed an advantage somewhat comparable to that which the submarine gains from its underwater movements. Under present development of aircraft, the taking on board of the passengers and crew of a visited merchant vessel would be less feasible than for a submarine. The aircraft is dependent upon the supply of fuel at comparatively short intervals and fuel bases are of capital importance.

Interference with neutral commerce, 1914.—There was much correspondence upon the matter of interference with neutral commerce in the early days of the World

War. There were many differences of opinion upon contraband, blockade, unneutral service, visit and search, capture, destruction, etc.

Soon after the beginning of the war the diversion of ships and cargo became a subject of diplomatic notes. To a request of the American Secretary of State of August 13, 1914, the American Ambassador in Great Britain replied on August 18:

"Sir Edward Grey informs me that the British Government will consider claims of American shippers whose cargoes destined for ports of British enemies are diverted to British ports and sold. If such claims for loss by such diversion be established, the British Government will in due time pay them." (Foreign Relations, U. S., 1914, Supplement, p. 305.)

During August and September 1914 there had been much correspondence on the diversion of American shipping to British ports, and after protests by the American Government as to delays of ships and cargoes the British Government proposed to do, and asserted that they were—

"doing all in their power to ensure that innocent neutral cargo shall be restored to its owners with as little delay as possible, and that the unavoidable inconvenience to neutral merchants shall be minimized so far as possible." (Ibid., p. 316.)

Mr. Van Dyke, the American Minister in The Netherlands, sent a telegram, which was received in Washington, October 2, 1914, as follows:

"We desire to protest energetically against measures taken by belligerent governments regarding shipments consigned us from the United States which have resulted in the Holland-America Line refusing to accept cargo intended for us unless consigned to the Dutch Government. We feel that American houses are entitled to conduct their business direct with their branches without interference as long as the goods clearly bear the neutral origin, character, and destination and are transported to neutral destination by neutral carriers. We are willing to sign a declaration to the effect that we are the consignees of the respective goods; that they are or will be sold to our customers in the Netherlands exclusively or for reexportation to such countries only as are not at war. This declaration should fully cover the requirements of all belligerents." (Ibid., p. 317.)

World War opinions, 1914.—As early as October 9, 1914, the Acting Secretary of State of the United States gave a reply to a query regarding the destruction of ships of belligerents engaged in transportation of neutral goods between neutral ports:

"The practice of nations in the past, stated generally, has been to sink prizes of war taken on the seas if either the ship or any part of her cargo was neutral property only when military necessity made this course imperative. This practice has now been embodied, at least in part, in the rules on the subject laid down by the Declaration of London, which Germany appears to have adopted for her guidance in the present naval warfare, and on which she has presumably based her action in this instance. It is not to be presumed, however, that the German Government will refuse to grant indemnity for neutral property which has been lost in such manner and which would otherwise have been restored by a court of prize." (Foreign Relations, 1914, Supplement, p. 319.)

In the case of the *Glitra* before the German prize court on July 30, 1915, it was said:

"As regard the condition of naval warfare in particular there is no protection either general or specific afforded to neutral merchandise by article 3 of the Paris declaration against the acts of the belligerent party resulting from the circumstances of the war. Article 3 referred to above is intended to afford protection against the prize law to which, up to the time of the Paris declaration, neutral merchandise in the enemy ship was exposed. Whatever the circumstances of the war demand, must be permitted to take place without regard to the fact that neutral merchandise is on board the ship. If, according to article 2 of the Paris declaration, the neutral flag protects enemy merchandise, this does not mean that vice versa the enemy ship is to be protected by neutral merchandise, protected in the first place, perhaps only against destruction, but by the same token in innumerable cases against any exercise of the prize law."

"As far as can be ascertained, no one has disputed this even down to the most recent time." (1922 Naval War College, International Law Decisions, p. 35.)

British interference with American merchant vessels, 1914.—Toward the end of December 1914 the Government of the United States sent a long note to the British Government stating its attitude on the conduct of British authorities toward American shipping. While assuring the British Government of its friendly spirit, the American Government did not wish its silence on certain

British practices to be construed as acquiescence in an infringement upon neutral rights when American goods destined for neutral ports were taken into and long detained in British ports, even when the goods were destined to named persons in a state guaranteeing nonexportation of contraband. The American Government considered the interference with American commerce had been of a character "not justified by international law or required under the principles of self-preservation." The American note called attention to British inconsistencies in the application of announced British policies particularly as regards contraband. This note of December 26, 1914, further stated that:

"The Government of the United States readily admits the full right of a belligerent to visit and search on the high seas the vessels of American citizens or other neutral vessels carrying American goods and to detain them *when there is sufficient evidence to justify a belief that contraband articles are in their cargoes;* but His Majesty's Government, judging by their own experience in the past, must realize that this Government can not without protest permit American ships or American cargoes to be taken into British ports and there detained for the purpose of searching generally for evidence of contraband, or upon presumption created by special municipal enactments which are clearly at variance with international law and practice.

"This Government believes and earnestly hopes His Majesty's Government will come to the same belief, that a course of conduct more in conformity with the rules of international usage, which Great Britain has strongly sanctioned for many years, will in the end better serve the interests of belligerents as well as those of neutrals.

"Not only is the situation a critical one to the commercial interests of the United States, but many of the great industries of this country are suffering because their products are denied long-established markets in European countries, which, though neutral, are contiguous to the nations at war. Producers and exporters, steamship and insurance companies are pressing, and not without reason, for relief from the menace to transatlantic trade which is gradually but surely destroying their business and threatening them with financial disaster.

"The Government of the United States, still relying upon the deep sense of justice of the British nation, which has been so often manifested in the intercourse between the two countries during so many years of uninterrupted friendship, expresses confidently the hope that His Majesty's Government will realize the obstacles and difficulties which their present policy has placed in the way of

commerce between the United States and the neutral countries of Europe, and will instruct their officials to refrain from all unnecessary interference with the freedom of trade between nations which are sufferers, though not participants, in the present conflict; and will in their treatment of neutral ships and cargoes conform more closely to those rules governing the maritime relations between belligerents and neutrals, which have received the sanction of the civilized world, and which Great Britain has, in other wars, so strongly and successfully advocated." (Foreign Relations, U. S., 1914, Suppl., p. 374.)

British policy, 1914–16.—Sir Edward Grey (later Viscount Grey of Fallodon) carried on the negotiations in regard to contraband and other controversies arising with foreign states early in the World War. Such argumentative notes as that of December 26, 1914, sent by the American Government required reply, but the reply was not always in form of an adequate legal defense. Of some of this correspondence while Mr. Walter H. Page was American Ambassador, Sir Edward Grey said:

"The Navy acted and the Foreign Office had to find the argument to support the action; it was anxious work. British action provoked American argument; that was met by British counter-argument. British action preceded British argument; the risk was that action might follow American argument. In all this Page's advice and suggestion were of the greatest value in warning us when to be careful or encouraging us when we could safely be firm.

"One incident in particular remains in my memory, Page came to see me at the Foreign Office one day and produced a long despatch from Washington contesting our claim to act as we were doing in stopping contraband going to neutral ports. 'I am instructed,' he said, 'to read this despatch to you.' He read, and I listened. He then said: 'I have now read the despatch, but I do not agree with it; let us consider how it should be answered!' On other occasions he would urge us to find means of avoiding provocation of American feeling; for instance, he urged us to find some way of acting other than by Orders in Council, which since 1812 had had such odious associations for the United States. He knew that these were only a matter of form, and that there was nothing in them intrinsically offensive to the United States, but the name was hateful in America. Unfortunately Orders in Council were formalities essential to make our action legal in British Courts of Law and we could not do without them." (Grey of Fallodon, Twenty-five Years, vol. II, p. 160.)

Search at sea, 1915–16.—After the receipt of several notes assuring the United States that the measures taken

by the Allied Governments would not unjustifiably infringe upon neutral rights, the American Secretary of State sent to the American Ambassador in Great Britain a long communication on October 21, 1915, for presentation to the British Secretary of State for Foreign Affairs. The note called attention to various vexatious interferences with American commerce which the American Government had expected would cease. Among the annoyances mentioned was delay of shipping without adequate grounds of suspicion. This note states:

"(4) In regard to search at sea, an examination of the instructions issued to naval commanders of the United States, Great Britain, Russia, Japan, Spain, Germany, and France from 1888 to the beginning of the present war shows that search in port was not contemplated by the Government of any of these countries. On the contrary, the context of the respective instructions shows that search at sea was the procedure expected to be followed by the commanders. All of these instructions impress upon the naval officers the necessity of acting with the utmost moderation—and in some cases commanders are specifically instructed—in exercising the right of visit and search, to avoid undue deviation of the vessel from her course.

"(5) An examination of the opinions of the most eminent text writers on the laws of nations shows that they give practically no consideration to the question of search in port, outside of examination in the course of regular prize-court proceedings.

"(6) The assertion by His Majesty's Government that the position of the United States in relation to search at sea is inconsistent with its practice during the American Civil War is based upon a misconception. Irregularities there may have been at the beginning of that war, but a careful search of the records of this Government as to the practices of its commanders shows conclusively that there were no instances when vessels were brought into port for search prior to instituting prize court proceedings, or that captures were made upon other grounds than, in the words of the American note of November 7, 1914, 'evidence found on the ship under investigation and not upon circumstances ascertained from external sources.' A copy of the instruction issued to American naval officers on August 18, 1862, for their guidance during the Civil War, is appended.

"(7) The British contention that 'modern conditions' justify bringing vessels into port for search is based upon the size and seaworthiness of modern carriers of commerce and the difficulty of uncovering the real transaction in the intricate trade operations of the present day. It is believed that commercial transactions of the present time, hampered as they are by censorship of telegraph and postal communications on the part of belligerents, are essentially no more complex and disguised than in the

wars of recent years, during which the practice of obtaining evidence in port to determine whether a vessel should be held for prize proceedings was not adopted. The effect of the size and seaworthiness of merchant vessels upon their search at sea has been submitted to a board of naval experts, which reports that—

"'At no period in history has it been considered necessary to remove every package of a ship's cargo to establish the character and nature of her trade or the service on which she is bound, nor is such removal necessary. * * *

"'The facilities for boarding and inspection of modern ships are in fact greater than in former times; and no difference, so far as the necessities of the case are concerned, can be seen between the search of a ship of a thousand tons and one of twenty-thousand tons—except possibly a difference in time—for the purpose of establishing fully the character of her cargo and the nature of her service and destination. * * * This method would be a direct aid to the belligerents concerned in that it would release a belligerent vessel overhauling the neutral from its duty of search and set it free for further belligerent operations.'" * * *

"(12) The further contention that the greatly increased imports of neutral countries, adjoining Great Britain's enemies, raise a presumption that certain commodities, such as cotton, rubber, and others more or less useful for military purposes, though destined for those countries, are intended for reexportation to the belligerents who can not import them directly, and that this fact justifies the detention for the purpose of examination of all vessels bound for the ports of those neutral countries, notwithstanding the fact that most of the articles of trade have been placed on the embargo lists of those countries, can not be accepted as laying down a just or legal rule of evidence. Such a presumption is too remote from the facts and offers too great opportunity for abuse by the belligerent, who could, if the rule were adopted, entirely ignore neutral rights on the high seas and prey with impunity upon neutral commerce. To such a rule of legal presumption this Government can not accede, as it is opposed to those fundamental principles of justice which are the foundation of the jurisprudence of the United States and Great Britain." * * *

"(15) In view of these considerations, the United States, reiterating its position in this matter, has no other course but to contest seizures of vessels at sea upon conjectural suspicion and the practice of bringing them into port for the purpose, by search or otherwise, of obtaining evidence, for the purpose of justifying prize proceedings, of the carriage of contraband or of breaches of the order in council of March 11. Relying upon the regard of the British Government for the principles of justice so frequently and uniformly manifested prior to the present war, this Government anticipates that the British Government will instruct their officers to refrain from these vexatious and illegal practices." (Foreign Relations, U. S., 1915, Supplement, pp. 579–81.)

This was the championship of neutrality note, of which a paragraph at the end declares:

"This task of championing the integrity of neutral rights, which have received the sanction of the civilized world, against the lawless conduct of belligerents arising out of the bitterness of the great conflict which is now wasting the countries of Europe, the United States unhesitatingly assumes, and to the accomplishment of that task it will devote its energies, exercising always that impartiality which from the outbreak of the war it has sought to exercise in its relations with the warring nations." (Ibid., p. 589.)

At this time replies were long delayed to such protests, and often conditions were much changed before replies were received. The British Ambassador in the United States transmitted the reply to the note of October 21, 1915, on April 24, 1916, after more than six months. This reply gave extended consideration to the matter of visit and search *sur place*:

"5. When visit and search at sea are possible, and when a search can be made there which is sufficient to secure belligerent rights, it may be admitted that it would be an unreasonable hardship on merchant vessels to compel them to come into port, and it may well be believed that maritime nations have hesitated to modify the instructions to their naval officers that it is at sea that these operations should be carried out, and that undue deviation of the vessel from her course must be avoided. That, however, does not affect the fact that it would be impossible under the conditions of modern warfare to confine the rights of visit and search to an examination of the ship at the place where she is encountered without surrendering a fundamental belligerent right.

"6. The effect of the size and seaworthiness of merchant vessels upon their search at sea is essentially a technical question, and accordingly His Majesty's Government have thought it well to submit the report of the board of naval experts, quoted by the United States Ambassador in paragraph 7 of this note, to Admiral Sir John Jellicoe for his observation. The unique experience which this officer has gained as the result of more than 18 months in command of the Grand Fleet renders his opinion of peculiar value. His report is as follows:

"'It is undoubtedly the case that the size of modern vessels is one of the factors which renders search at sea far more difficult than in the days of smaller vessels. So far as I know, it has never been contended that it is necessary to remove every package of a ship's cargo to establish the character and nature of her trade, etc.; but it must be obvious that the larger a vessel and the greater the amount of cargo, the more difficult does exam-

ination at sea become, because more packages must be removed.

" 'This difficulty is much enhanced by the practice of concealing contraband in bales of hay and passengers' luggage, casks, etc., and this procedure, which has undoubtedly been carried out, necessitates the actual removal of a good deal of cargo for examination in suspected cases. This removal cannot be carried out at sea, except in the very finest weather.

" 'Further, in a large ship the greater bulk of the cargo renders it easier to conceal contraband, especially such valuable metals as nickel, quantities of which can easily be stowed in places other than the holds of a large ship.

" 'I entirely dispute the contention, therefore, advanced in the American note, that there is no difference between the search of a ship of 1,000 tons and one of 20,000 tons. I am sure that the fallacy of the statement must be apparent to anyone who has ever carried out such a search at sea.

" 'There are other facts, however, which render it necessary to bring vessels into port for search. The most important is the manner in which those in command of German submarines, in entire disregard of international law and of their own prize regulations, attack and sink merchant vessels on the high seas, neutral as well as British, without visiting the ship and therefore without any examination of the cargo. This procedure renders it unsafe for a neutral vessel which is being examined by officers from a British ship to remain stopped on the high seas, and it is therefore in the interests of the neutrals themselves that the examination should be conducted in port." (Foreign Relations, U. S., 1916, Supplement, p. 369.)

After a statement in regard to abuse of neutral rights by Germany, the note continues:

"The French Ministry of Marine shares the views expressed by Sir J. Jellicoe on the question of search at sea, and has added the following statement:

" 'Naval practice, as it formerly existed, consisting in searching ships on the high seas, a method handed down to us by the old Navy, is no longer adaptable to the conditions of navigation of the present day. Americans have anticipated its insufficiency and have foreseen the necessity of substituting some more effective method. In the Instructions issued by the American Navy Department, under date of June 20, 1898, to the cruisers of the United States, the following order is found (clause 13):

" 'If the latter (the ship's papers) show contraband of war, the ship should be seized; if not, she should be set free *unless by reason of strong grounds for suspicion a further search should seem to be requisite.*'

" 'Every method must be modified having regard to the modifications of material which men have at their disposal, on condition that the method remains humane and civilised.

" 'The French Admiralty considers that to-day a ship, in order to be searched, should be brought to a port whenever the state of the sea, the nature, weight, volume, and stowage of the suspect

cargo, as well as the obscurity and lack of precision of the ship's papers, render search at sea practically impossible or dangerous for the ship searched.

" 'On the other hand, when the contrary circumstances exist, the search should be made at sea.

" 'Bringing the ship into port is also necessary and justified when, the neutral vessel having entered the zone or vicinity of hostilities, (1) it is a question, in the interests of the neutral ship herself, of avoiding for the latter a series of stoppages and successive visits and of establishing once for all her innocent character and of permitting her thus to continue her voyage freely and without being molested; and (2) the belligerent, within his rights of legitimate defence, is entitled to exercise special vigilance over unknown ships which circulate in these waters.'

"The question of the locality of the search is, however, one of secondary importance. In view of His Majesty's Government the right of a belligerent to intercept contraband on its way to his enemy is fundamental and incontestable, and ought not to be restricted to intercepting contraband which happens to be accompanied on board the ship by proof sufficient to condemn it. What is essential is to determine whether or not the goods were on their way to the enemy. If they were, a belligerent is entitled to detain them, and having regard to the nature of the struggle in which the Allies are engaged they are compelled to take the most effectual steps to exercise that right." (Ibid., p. 370.)

The practice of searching vessels in port continued.

Opinion of J. A. Hall.—Mr. J. A. Hall, who, before the World War, published a book on the Law of Naval Warfare, issued a second edition after the war and after connection with the British Navy. The closing sentence of his preface reads:

"Navies and armies have not ceased to be necessary with the passing of the Great War, and so long as that is the case a knowledge of international law remains of special importance to the Officers of that Service 'whereon, under the good providence of God, the wealth, safety, and strength of the kingdom chiefly depend.'" (Law of Naval Warfare, 2d ed., p. vii.)

In discussing the right of visit and search and after he has referred to diversion for search in port, Mr. Hall says:

"Apart altogether from the special circumstances of the Great War arising out of Germany's illegal practices at sea, the following permanent reasons for this development of the right seem to afford it full justification:

"1. The ship's papers in these days, when telegraphs and other means of rapid communication are available for merchants, need afford no reliable indication of the destination of the cargo.

"2. The destination of the vessel owing to railways and other modern means of land transport is no criterion of the destination of the cargo.

"3. The ship's officers may be equally ignorant on this point.

"4. Modern means of communication, while reducing the value of evidence from the ship, has enormously increased the powers of a belligerent government to obtain information from the vessel's port of departure and pass on instructions to its examining cruisers.

"5. The size of modern merchant ships enables them to keep at sea when weather conditions make even visiting them impossible.

"6. The necessary extension of contraband to cover articles of small bulk but of great value for war, together with the huge cargo capacity of modern ships, has made concealment easy and an adequate examination of such cargo at sea impossible." (Ibid., p. 206.)

It is admitted that war will cause inconvenience to neutral commerce, but that the right of visit and search should not be abused.

"In the first place the spot selected for search must not involve an unreasonable deviation of the vessel from her voyage. In the second place, it seems perfectly clear that nothing in international law can justify diversion merely in the hope of discovering by subsequent search evidence of contraband or other noxious trading: there must be some substantial ground, no matter from what source it is derived, for suspecting that this particular vessel is engaged in such trade, although the evidence may not at the moment be sufficient to support a plea for condemnation in the prize court." (Ibid., p. 267.)

National rules on diversion.—The diversion of a merchant ship from its course has long been restricted and often specific rules were issued.

The German Prize Ordinance of 1909 prescribed in regard to neutral ships:

"81. The captain must as much as possible avoid diverting a ship under a neutral flag from her course during the visit and search; he shall especially endeavor to cause the ship the least possible inconvenience, especially will he in no circumstances require the master to come on board the man-of-war, or that a boat, men of the crew, the ship's papers, etc. be sent on board."

"85. If the weather make boarding impossible, the captain will prescribe a given course to the ship, in case he has serious suspicion of her and will follow himself, until it is possible to carry out the visit."

"10. Should anything, for example, bad weather, prevent a boarding party from being sent on board, a suspect ship is to be brought into port without further procedure.

"Should it be necessary at the same time to declare such a ship as captured, she must be ordered to haul down her flag and to follow the war vessel."

"11. It must be clearly stated in the Prize Report whether the ship has been captured or merely brought into port for search; in the latter case the reason must be given, for example, whether search was impossible for military reasons or owing to the nature of the cargo, weather, etc."

"91. If the making of the search is proved to be necessary, but at the time is not practicable to carry out, the ship will be searched later at a suitable place. If this causes serious disadvantages to the ship to be searched, the captain will proceed to the provisional capture."

The Japanese Regulations of 1904, in Article 51, said briefly:

"In visiting or searching a vessel the captain of the man-of-war shall take care not to divert her from her original course more than necessary and as far as possible not to give her inconvenience."

Case of the Joseph W. Fordney.—There were many cases of detention on grounds of doubtful legality during the World War, 1914–18.

Protests by the Government of the United States were met by delays and by correspondence often confusing the issues. The delays and excuses in the case of the steamer *Joseph W. Fordney* led the American Secretary of State after long correspondence to say in a letter to the American Ambassador in Great Britain on November 3, 1915:

"The note addressed to you by Foreign Office under date October 6, 1915, confirms Department's original supposition seizure cargo steamer *Joseph W. Fordney* was an illegal act on part British authorities since goods were seized on suspicion and without probable cause. These goods were subject to seizure only if consigned to German Government or its armed forces. Department observes Foreign Office states that, as His Majesty's Government 'now' have reason to believe that the goods 'were for the enemy Government or its armed forces, proceedings for condemnation are being taken on that ground.' In other words, it appears that approximately one half year after seizure goods British authorities believe they have such evidence as alone would have justified seizure this cargo. Department does not perceive the pertinency to matter under discussion of statement to you by Foreign Office pointing out that when it was arranged that you should be informed regarding detention of ships, with an indication of the grounds of detention, it was emphasized that this undertaking would not be understood as debarring British Government from

raising additional grounds for proceeding against a cargo or ship in prize court. If adequate evidence warranting seizure goods was not disclosed by due examination of vessel at time of its seizure, there of course could be no lawful seizure of the cargo and, therefore, no subsequent lawful prize court proceedings.

"Communicate with Foreign Office in sense foregoing, and since it would appear from British Government's own statement cargo was illegally seized, you may renew your request for its release." (Foreign Relations, U. S., 1915, Supplement, p. 608.)

After further correspondence and delays on April 13, 1916, the Secretary of State sent another dispatch to the American Ambassador:

"Representatives Atlantic Export Company, shippers of cargo on steamer *Joseph W. Fordney*, inform Department they have been advised by English lawyers that new order in council, March 30 last, regarding conditional contraband is construed by British authorities as retroactive and will be applied to cargo of this vessel and in other American cases set for early trial. These representatives state that proceedings of this character would amount to denial justice in the case of this cargo. Department agrees with views of shippers as to unwarranted character these proceedings. Department has made known to British Government through you its views that if proper examination warranting the seizure of goods in question was not disclosed by proper examination of vessel at the time its seizure, there could be no lawful seizure of the cargo and, therefore, no subsequent lawful prize court proceedings, and that seizure of a vessel and cargo can not be justified on the strength of evidence of illegal destination cargo discovered, as appears according to the British Government's statement to have been the case with reference to steamer *Joseph W. Fordney*, approximately one-half year after seizure took place. No reply justifying such a course has been made by British Government.

"Communicate with Foreign Office in sense foregoing and say that this Government considers it is entitled to receive statement from British Government regarding their views as to how such evidence can warrant a seizure of this kind and prize court proceedings in relation thereto." (Ibid., p. 363.)

Not until May 9, 1916, did the Ambassador inform the Secretary of State that the Foreign Office stated that "the British Government must decline to enter into any discussion of points which are awaiting decision in a case pending in the prize court."

A long note from Sir Edward Grey was transmitted to the Secretary of State on April 24, 1916, in which the actions complained of by the United States were discussed

and the course pursued by British authorities was defended.

The cargo of the *Joseph W. Fordney*, "10 million pounds of feed and cake" recognized as conditional contraband consigned to a neutral country was condemned as good and lawful prize.

Resistance.—As visit and search in time of war is generally regarded as the exercise of a legitimate war right, resistance to visit and search makes the merchant vessel liable to consequences. Naval regulations relating to resistance vary. An attempt to escape, as by flight or under cover of darkness, does not justify condemnation, but does render the ship suspect and liable to capture and bringing into port. Such force may be used as is necessary to bring the merchant vessel to, and this usually consists in firing a shot in advance of the vessel and across the bow. Forcible resistance makes the vessel liable to condemnation. The German Prize Code, 1916, Article 5, stated:

"Care is to be taken in determining whether an attempt has been made to escape.

"The commanding officer must:

"(1) Make certain that the signals have been understood, especially if there is another ship in the vicinity.

"(2) In the case of merchant ships, any increase in speed is generally small, and barely distinguishable from any great distance, as they in any case usually steam at full speed.

"(3) Some companies have ordered their ships, in the event of their being held up, not to reverse the engines, but simply to stop and allow the ship to proceed until she has lost her way." (1925 Naval War College. International Law Documents, p. 44.)

In the German Prize Ordinance, September 30, 1909, it was explained that—

"An attempt to escape renders the ship suspect and therefore justifies her being captured and brought into port without further procedure. If, however, the ship is not liable to confiscation on other ground—for example, on account of carrying contraband or rendering assistance contrary to the laws of neutrality—she may not be sunk, nor, if it is impossible to bring her into port, may any other disadvantages be imposed upon her by way of punishment." (Ibid., p. 44.)

The unratified Declaration of London, 1909, was considered as reflecting the general opinion on the law at that period. Article 63 of the Declaration of London states:

"Forcible resistance to the legitimate exercise of the right of stoppage, visit and search, and capture, involves in all cases the condemnation of the vessel. The cargo is liable to the same treatment which the cargo of an enemy vessel would undergo. Goods belonging to the master or owner of the vessel are regarded as enemy goods." (1909 Naval War College, International Law Topics, p. 145.)

A provision to the above effect was in many national rules in 1914.

The Spanish Instructions of 1898, after referring to hoisting the flag and firing a blank shot, show a considerate attitude toward the merchant vessel:

"If the merchant vessel does not obey this first intimation, and either refuses to hoist her flag or does not lay to, a second gun will be fired, this time loaded, care being taken that the shot does not strike the vessel, though going sufficiently close to her bows for the vessel to be duly warned; and if this second intimation be disregarded, a third shot will be fired at the vessel, so as to damage her, if possible, without sinking her. Whatever be the damage caused to the merchant vessel by this third shot, the commanding officer of the man-of-war or captain of the privateer can not be made responsible.

"Nevertheless, in view of special circumstances, and in proportion to the suspicion excited by the merchantman, the auxiliary vessel of war or privateer may delay resorting to the last extremity until some other measure has been taken, such as not aiming the third discharge at the vessel, but approaching it and making a fresh notification by word of mouth; but if this last conciliatory measure prove fruitless, force will immediately be resorted to." (Article 4, b.)

Resistance and armed merchant vessels of belligerents.—Before the days of steam navigation, merchant vessels were usually equipped for defense against pirates, sea robbers, privateers, and often against the more lightly armed vessels of war. With the introduction of modern armored and armed vessels of war, there was little reason for arming merchant vessels. The Declaration of Paris, 1856, that "Privateering is and remains abolished", re-

moved one of the reasons formerly advanced to support arming of merchant vessels, but the claim to the right to convert fast steam vessels into vessels of war under government control soon followed. The Hague Conference of 1907 made an effort to regularize such conversion by conventional agreement, but some of the most important commercial states did not ratify the convention. The conditions of World War, 1914–18, led, however, to the arming of many vessels ordinarily classed as merchant vessels. There then arose the controversy as to the distinction between an unarmed merchant vessel and one armed for defense. Attempts to define what might constitute armament for defense met with indifferent success. The distinction between defensive and offensive action at the time of approach for visit and search would usually rest upon the intention of the master of the armed merchant vessel which would not be provable, and a test to which the visiting vessel of war would scarcely care to submit.

W. E. Hall, whose treatise on International Law was a standard in England from the latter half of the nineteenth century, said:

"The right of capture on the ground of resistance to visit, and that of subsequent confiscation, flow necessarily from the lawfulness of visit, and give rise to no question. If the belligerent when visiting is within the rights possessed by a state in amity with the country to which the neutral ship belongs, the neutral master is guilty of an unprovoked aggression in using force to prevent the visit from being accomplished, and the belligerent may consequently treat him as an enemy and confiscate his ship.

"The only point arising out of this cause of seizure which requires to be noticed is the effect of resistance upon cargo when made by the master of the vessel, or upon vessel and cargo together when made by the officer commanding a convoy. The English and American courts, which alone seem to have had an opportunity of deciding in the matter, are agreed in looking upon the resistance of a neutral master as involving goods in the fate of the vessel in which they are loaded, and of an officer in charge as condemning the whole property placed under his protection. 'I stand with confidence', said Lord Stowell, 'upon all fair principles of reason, upon the distinct authority of Vattel, upon the institutes of other great maritime countries, as well as those of

our own country, when I venture to lay it down, that by the law of nations as now understood a deliberate and continued resistance to search, on the part of a neutral vessel, to a lawful cruiser, is followed by the legal consequences of confiscation.'" ([The Maria (1799) 1 C. Rob. 369.] Hall, International Law, Higgins, 8th ed., p. 891.)

Holland's opinion, 1905.—Sir Thomas Erskine Holland, late professor of international law at Oxford University and responsible for the Admiralty Manual of Prize Law of 1888, gave a summary of his opinion upon the sinking of neutral prizes in a letter to the London Times, June 29, 1905:

"1. There is no established rule of international law which absolutely forbids, under any circumstances, the sinking of a neutral prize. A *consensus gentium* to this effect will hardly be alleged by those who are aware that such sinking is permitted by the most recent prize regulations of France, Russia, Japan, and the United States.

"2. It is much to be desired that the practise should be, by future international agreement, absolutely forbidden—that the lenity of British practice in this respect should become internationally obligatory.

"3. In the meantime, to adopt the language of French instructions, 'On ne doit user de ce droit de destruction qu'avec plus la grande réserve'; and it may well be that any given set of instructions (e. g. the Russian) leaves on this point so large a discretion to commanders of cruisers as to constitute an intolerable grievance.

"4. In any case, the owner of neutral property, not proved to be good prize, is entitled to the fullest compensation for his loss. In the language of Lord Stowell:

"'The destruction of the property may have been a meritorious act towards his own Government; but still the person to whom the property belongs must not be a sufferer . . . if the captor has by the act of destruction conferred a benefit upon the public, he must look to his own Government for his indemnity.'" (Holland, Letters on War and Neutrality, 3d ed., 179.)

American attitude, 1916.—When relations were strained between the United States and Germany in early 1916 questions were raised in regard to visit and search. In a communication from the Secretary of State to the American Ambassador in Germany, April 28, 1916, it was said:

"If Secretary von Jagow asks you as to the methods of warfare which this Government considers to be legal, you may hand to him a memorandum reading as follows:

"'Memorandum on Conduct of Naval Vessels toward Merchant Ships.

"'1. A belligerent warship can directly attack if a merchant vessel resists or continues to flee after a summons to surrender.

"'2. An attacking vessel must display its colors before exercising belligerent rights.

"'3. If a merchant vessel surrenders, the attack must immediately cease and the rule as to visit and search must be applied—

"'(a) by a visit to the vessel by an officer and men of the attacking ship; or

"'(b) by a visit to the attacking ship by an officer of the vessel attacked, with the ship's papers.

"'4. An attacking vessel must disclose its identity and name of commander when exercising visit and search.

"'5. If visit and search disclose that the vessel is of belligerent nationality, the vessel may be sunk only if it is impossible to take it into port, *provided* that the persons on board are put in a place of safety and loss of neutral property is indemnified.

"'NOTE: (a) A place of safety is not an open boat out of sight of land.

"'(b) A place of safety is not an open boat, if the wind is strong, the sea rough, or the weather thick, or if it is very cold.

"'(c) A place of safety is not an open boat which is overcrowded or is small or unseaworthy or insufficiently manned.

"'6. If, however, visit and search disclose that the vessel is of neutral nationality, it must not be sunk in any circumstances, except of gravest importance to the captor's state, and then only in accordance with the above provisos and notes.'

"You may further state that this Government is unwilling and can not consent to have the illegal conduct of Germany's enemies toward neutrals on the high seas made a subject of discussion in connection with the abandonment of illegal methods of submarine warfare." (Foreign Relations, U. S., 1916 Supplement, p. 252.)

Attempt to escape.—The attempt of an enemy merchant vessel to escape visit and search is natural and lawful, and well established rules exist to protect the merchant vessel in the exercise of the effort to escape. Even when attempting to escape the merchant vessel has from the eighteenth century been entitled to considerate treatment and is not liable to penalty merely because of the attempt. Signals must be given to bring the merchant vessel to. The warning gun across the bow was commonly required, and the vessel of war was required to hoist its true colors before firing a gun in action. In order that no undue risk may be incurred by the mer-

chant vessel, the visiting personnel was limited in number and arms. The master of the visited vessel or his representative should not be required to come on board any visiting vessel to show his papers or for any other purpose, though on board he may be required to show his papers or open receptacles or hatches for investigation. If the master refuses to furnish information or declines to show essential papers, this may be considered a ground of suspicion justifying bringing the ship before a prize court. Even an enemy merchant vessel may have on board neutral persons and property entitled to consideration under the law. It has been said of visit and search that, "All that was necessary to this object was lawful; all that transcends it was unlawful." (The *Anna Maria* [1817], 2 Wheaton 327.)

Article 22, London Naval Treaty, 1930.—The Articles of the London Naval Treaty of 1930 were in general to remain in force till December 31, 1936, but part IV, Article 22, was to "remain in force without limit of time." This article provides:

"ARTICLE 22. The following are accepted as established rules of International Law:

"(1) In their action with regard to merchant ships, submarines must conform to the rules of International Law to which surface vessels are subject.

"(2) In particular, except in the case of persistent refusal to stop on being duly summoned, or of active resistance to visit or search, a warship, whether surface vessel or submarine, may not sink or render incapable of navigation a merchant vessel without having first placed passengers, crew and ship's paper in a place of safety. For this purpose the ship's boats are not regarded as a place of safety unless the safety of the passengers and crew is assured, in the existing sea and weather conditions, by the proximity of land, or the presence of another vessel which is in a position to take them on board.

"The High Contracting Parties invite all other Powers to express their assent to the above rules." (1930 Naval War College, International Law Situations, p. 159; 46 Stat. (Pt. II), 2858.)

While it might have been preferable to have an article which would have limited its provisions to the statement

of the first paragraph, merely requiring submarines to conform to the rules for surface vessels, the statement does not necessarily extend by analogy to aircraft.

The general principles of visit and search would, however, be unchanged, even though a new instrumentality might be introduced. The summoning, bringing to, boarding, inspection of papers, search in certain cases, taking in, and bringing before a prize court was the general procedure, though in certain cases some of these steps might be omitted. A surface vessel under modern conditions might consider it expedient to escort a vessel to port for search by port authorities, omitting other procedure. The state of the escorting vessel in such a case assumes all liability for the action if it proves ungrounded, and in any case the service of the escorting vessel has been for the time lost to its forces. The seized vessel cannot complain that the belligerent making the seizure has not acted in good faith and shown adequate evidence of suspicion. The placing of a prize crew on board is analagous as an evidence of intent to make a *bona fide* seizure.

The mere ordering into port for search is a practice of a different character and liable to grave abuses.

Discussion, The Hague, 1923.—At The Hague in 1923 the Commission of Jurists did not find it easy to agree upon rules for visit and search, and the Netherlands Delegation made reservations upon the rules as formulated. This delegation regarded aircraft as a new engine of war unlike a vessel of war and unable to exercise a similar control over a merchant vessel and uncertain as to its control over private aircraft. No article upon the exercise of visit and search of merchant vessels by aircraft received a majority vote of the delegations. The United States, British Empire, France, Italy, Japan, and the Netherlands were represented. A majority of the

delegations did not feel able to support the principle embodied in Article 49 of the Report of the Commission to the following effect:

"Private aircraft are liable to visit and search and to capture by belligerent military aircraft."

All agreed that such an article should be carefully guarded in order to avoid abuse. It was evident that visit and search *sur place* would often be impossible by aircraft of any type in use in 1923, and would be possible only under very favorable conditions. It was agreed that to permit an aircraft to compel a merchant vessel to come to a convenient place for visit and search would impose much inconvenience and heavy losses on the vessel, and that such an act on the part of a belligerent surface vessel of war was of doubtful validity.

"The French Delegation proposed the following text:
"Aircraft are forbidden to operate against merchant vessels, whether surface or submarine, without conforming to the rules to which surface warships are subject." (1924 Naval War College, International Law Documents, p. 138.)

The discussion which is summarized in the General Report of the Commission of Jurists, February 19, 1923, is of such significance that it is presented somewhat fully.

Visit and search by aircraft.—The preliminary drafts of a code for aerial warfare before the Commission of Jurists upon the revision of the rules of warfare at The Hague, 1922–23, were those of the United States and Great Britain. The commission worked on the basis of a draft submitted by the American Delegation, and the American and British drafts provided for the use of aircraft in visit and search. Some of the other states were opposed. The Netherlands Delegation felt:

"that the custom and practice of international law is limited to a right on the part of belligerent warships to capture after certain formalities merchant vessels employed in the carriage of such commerce. No justification exists for the extension of those

rights to an aircraft, which is a new engine of war entirely different in character from a warship and unable to exercise over merchant vessels or private aircraft a control similar to that exercised by a warship over merchant vessels. Consequently there is no reason to confer on a military aircraft the right to make captures as if it were a warship, and no reason to subject commerce to capture when carried in an aircraft. In developing international law the tendency should be in the direction of conferring greater, not less, immunity on private property." (1924 Naval War College, International Law Documents, p. 137.)

The majority of delegations, however, did not oppose visit and search and capture of private aircraft by belligerent military aircraft, but a majority of votes was not secured upon an article extending to belligerent military aircraft the right of visit and search of merchant vessels and wide divergence of view was expressed, and in the report it was stated that:

"The aircraft in use to-day are light and fragile things. Except in favourable circumstances they would not be able to alight on the water and send a man on board a merchant vessel at the spot where the merchant vessel is first encountered (*visite sur place*). To make the right of visit and search by an aircraft effective it would usually be necessary to direct the merchant vessel to come to some convenient locality where the aircraft can alight and send men on board for the purpose. This would imply a right on the part of the belligerent military aircraft to compel the merchant vessel to deviate from her course before it was in possession of any proof derived from an examination of the ship herself and her papers that there were circumstances of suspicion which justified such interference with neutral trade. If the deviation which the merchant vessel was obliged to make was prolonged, as might be the case if the aircraft was operating far from land, the losses and inconvenience imposed on neutral shipping would be very heavy.

"Is or is not a warship entitled to oblige a merchant vessel to deviate from her course for the purpose of enabling the right of visit and search to be carried out? Would an aircraft be exercising its rights in conformity with the rules to which surface warships are subject if it obliged a merchant vessels to deviate from her course in this way? Even if a warship is entitled on occasion to oblige a merchant vessel to deviate from her course before visiting her, can a similar right be recognised for military aircraft without opening the door to very great abuses?" (Ibid., p. 137.)

Prohibition of the use of aircraft against merchant vessels except under the rules applicable to surface ves-

sels of war was the principle supported by the majority in 1924.

The Report of the Commission of Jurists shows the attempts made in 1924 to reach an agreement.

"The American Delegation, therefore, proposed the following text:

"'Aircraft are forbidden to visit and search surface or subsurface vessels without conforming in all respects to the rules to which surface vessels authorized to conduct visit and search are subject.

"'In view of the irregularities to which the use of aircraft against merchant vessels might give rise, it is declared that aircraft cannot divert a merchant vessel from its course without first boarding it; that in no event may an aircraft destroy a merchant vessel unless the crew and passengers of such vessel have first been placed in safety; and that if an aircraft cannot capture a merchant vessel in conformity with these rules it must desist from attack and from seizure and permit such vessel to proceed unmolested.'" (Ibid, p. 139.)

The British Delegation, maintaining the analogy to the submarine, proposed the language of the unratified Washington Treaty of February 6, 1922, substituting, except in the phrasing of the preliminary cause, the word "aircraft" for "submarine", as follows:

"The use of aircraft against merchant vessels must be regulated by the following provisions, which, being in conformity with the rules adopted by civilised nations for the protection of the lives of neutrals and non-combatants at sea in time of war, are to be deemed an established part of international law:

"A merchant vessel must be ordered to submit to visit and search to determine its character before it can be seized.

"A merchant vessel must not be attacked unless it refuses to submit to visit and search after warning or to proceed as directed after seizure.

"A merchant vessel must not be destroyed unless the crew and passengers have first been placed in safety.

"Belligerent aircraft are not under any circumstances exempt from the universal rules above stated; and if an aircraft cannot capture a merchant vessel in conformity with these rules, the existing law of nations requires it to desist from attack and from seizure and to permit the merchant vessel to proceed unmolested." (Ibid., p. 139.)

The Japanese Delegation saw practical difficulties and dangers in this procedure, but at length expressed readiness to accede to the American proposal.

The Italian Delegation suggested the addition of the following to the British proposal:

"After the first paragraph add—

"'Visit must in general be carried out where the merchant vessel is first encountered. Nevertheless, in cases where it may be impossible to alight and there is at the same time good ground for suspicion, the aircraft may order the merchant vessel to deviate to a suitable locality, reasonably accessible, where she may be visited. If no good cause for this action is shown, the belligerent State must pay compensation for the loss caused by the order to deviate.'

"After the third paragraph add—

"'If the merchant vessel is in the territorial waters of the enemy State and not on the high seas, she may be destroyed after previous notice has been given to the persons on board to put themselves in a place of safety and reasonable time has been given them for so doing.'" (Ibid., p. 140.)

The Italian Delegation also maintained that a majority of the European Powers admitted that a merchant vessel might be obliged to deviate to a suitable port where visit might take place.

The Netherlands delegation accepted the American proposal.

"When put to the vote the American proposal was supported by the Japanese and Netherlands Delegations and opposed by the British, French and Italian. The French proposal was opposed by the American, British, Japanese and Netherlands Delegation. The British and Italian Delegations explained that they could only support it if it was amplified in the way indicated in the British and Italian amendments..

"Although all the Delegations concurred in the expression of a desire to adopt such rules as would assure the observance of the dictates of humanity as regards the protection of the lives of neutrals and non-combatants, the Commission, by reason of a divergence of views as to the method by which this result would best be attained, was unable to agree upon an article dealing with the exercise of belligerent rights by aircraft against merchant vessels. The code of rules proposed by the Commission therefore leaves the matter open for future regulation." (Ibid., p. 141.)

Mr. Spaight on aircraft operations against merchant vessels.—Mr. J. M. Spaight, who has given much attention in Great Britain to the aspects of aviation as a factor in war, has a chapter on the operation of aircraft against merchant vessels in his book upon "Air Power and War

Rights." Among the questions he raises is whether aircraft have the right to visit and search, and to capture merchant vessels. This question became a practical one during the World War, 1914–18, and Mr. Spaight says:

"Unquestionably the visit or boarding of a marine craft by an aircraft is technically not impossible."

He also cites instances of acts involving the exercise of visit and search and capture:

"In the *Aeroplane* of 4 July, 1917, there will be seen a photograph of a German seaplane floating beside a submarine and a German officer or man standing on one of the seaplane's floats and handing a document to the commander of the submarine. Here, then, was a clear case of visit. It was unofficially reported from Rotterdam on 23 July, 1917, that the Dutch steamer "Gelderland" was stopped by three German seaplanes off the Hook of Holland, and that a German officer went on board and forced the ship to proceed to Zeebrugge. It has been placed on record by Naval Capt. Hollender that the German airship L. 40, after landing on the water, examined a ship's papers, and that the L. 23 surpassed this feat by not only sending a party (in the ship's boats) to inspect the cargo of a Norwegian three-masted sailing ship, but put a prize crew of three on board the vessel, which was then safely brought into a German port, after a voyage of 43 hours in the North Sea." (2d edition, p. 471.)

Mr. Spaight, while admitting that such visit and search may have been exceptional during the World War, foresees that with changed conditions the exception may in a modified form become the rule.

Judge Moore on Hague Commission, 1922–23.—Judge John Bassett Moore, of the American Commission of Jurists meeting at The Hague in 1922–23 and drawing up rules for the control of radio in time of war and rules of aerial warfare, was elected President of the Commission. He said of the rules submitted in the General Report of the Commission made on February 19, 1923:

"Among the numerous and varied questions with which the Commission undertook to deal, the only one for the regulation of which it was unable to agree upon a rule was that of visit and search of merchant vessels by aircraft. Proposals on the subject were presented by the British as well as by the American delegation; but the American delegation, in the light of what the discussions developed, soon became convinced that both proposals were

defective, and that, without stricter and more specific regulation and control, aircraft might inflict on life and property at sea calamities fully as startling as those that had resulted in the recent war from the employment of submarines. * * *

"As regards the second topic—the visit and search of surface ships—the report, after describing the normal practice of cruisers, including the sending of an officer aboard in order to ascertain whether there is cause for capture, and the sending of a prize crew aboard if a case for capture is established, found that, if aircraft observed regular methods, they could exercise visit and search 'only under favorable conditions,' but that, if 'the right of diverting merchant vessels, without boarding them,' were 'legally established', aircraft could exercise it 'up to the limit of their range of action from their land or floating base.' Such range of action may fairly be considered as extending to a distance of at least two hundred-and-fifty miles. As regarded the right under certain conditions to sink a prize after due provision has been made for the safety of the crew, the report, while not intimating that such provision could ordinarily be made by the aircraft itself, stated that 'in favorable weather, and when it is easy to reach a friendly or neutral port, a crew may be compelled to abandon their ship and the ship may be fired upon and sunk by the aircraft.' The contemplation of aircraft thus ranging the seas and issuing to unvisited and unsearched vessels orders enforcible by bombing the ship or by firing upon the persons aboard, can scarcely be indulged without grave apprehensions. It was the possibilities thus suggested that led Mr. Struycken, first delegate from The Netherlands, to declare, both in subcommittee and in plenary session, that such a method of warfare might readily mean the terrorizing of the seas." * * *

"Had the American delegation, in view of the divergence of opinions as to the right, or the extent of the right, even of surface craft to deviate merchantmen without search, been willing to concur in a mere enunciation of the principle that aircraft should have, as regarded the exercise of visit and search, the same rights as surface vessels, without attempting to say what those rights were, a majority vote might have been obtained for such a resolution. This would have been a compromise, and compromise is said to be of the essence of statesmanship. But there are two kinds of compromise. One kind is that in which there is a meeting of minds, resulting in an agreement. This is a wholesome and salutary process. The other kind is that in which there is no meeting of minds, but the divergence is veneered with a deft formula, cloaking a disagreement. This process is but a breeder of future quarrels." (Moore, International Law and Some Current Illusions, pp. 202, 204.)

Aircraft and deviation.—From their nature and physical limitations, aircraft might act as agents for deviation when they might not have the personnel or

other requisites essential for making a capture in the manner prescribed for surface vessels of war. If notification, with instructions to proceed to a named port only, is all that is necessary to constitute capture, it would be easy for an aircraft equipped with radio to make a large number of captures of this nature. J. M. Spaight, of Great Britain, writing from the point of view of the operations of a stronger sea power, said in 1926:

"Deviation is likely to become the rule, not the exception, in future. Visit and search at sea by aircraft will always probably be difficult. The ransacking of a liner will certainly be a practical impossibility. Even if visit *sur place* is declared obligatory, it is unlikely to be anything but perfunctory. But most probably there will be no visit at all. Ships will be ordered to named ports and if they take the risk of disobeying the order and persist in disobeying it, they will be attacked and perhaps sunk. The conditions of 1915–18 may be reproduced in an aggravated form.

"The position of neutral commerce will indeed be wellnigh intolerable. Freedom of the sea will be dead and gone. Neutral shipping will be policed and dragooned as it never has been before. It was scourged with whips in 1914–18; it will be scourged with scorpions in a future war. Because the complete interruption of all neutral trade beneficial to the enemy will be more important than ever, because the grip on that trade will be tighter than ever and evasion more difficult, the conflict of belligerent and neutral interests will be sharper, the consequent disputes more bitter, and the danger of actual war with neutral States greater than in the past." (Aircraft and Commerce in War, p. 52.)

Understood summons.—The consequences of visit and search are so important that there should be no doubt that the summons is understood and the visiting vessel should especially guard against extreme action until convinced that an appearance of disregard of a signal is not misleading.

The Japanese Instructions of 1916, after providing day and night signals, stated:

"3. In the event of the merchant ship disregarding the orders given under the preceding two clauses, it may be fired on by the warship.

"4. For the time being, if it is found that the meaning of the signals above mentioned is not understood, His Imperial Majesty's

ships will communicate with merchant ships in the international code of signals. The procedure hitherto followed in other respects remains unchanged."

The Instructions for the Navy of the United States Governing Maritime Warfare, 1917, stated:

44. Subject to any special treaty provisions the following procedure is directed: Before summoning a vessel to lie to, a ship of war must hoist her own national flag. The summons shall be made by firing a blank charge (coup de semonce), by other international signal, or by both. The summoned vessel, if a neutral, is bound to stop and lie to, and she should also display her colors; if an enemy vessel, she is not so bound, and may legally even resist by force, but she thereby assumes all risks of resulting damage.

"45. If the summoned vessel resists or takes to flight she may be pursued and brought to, by forcible measures, if necessary."

Treaties often made very particular provisions as to the method which the whole conduct of the visit and search should follow. Each vessel was entitled to know the identity of the other and measures necessary to this end were essential. The summoning gun was the method of attracting attention before the use of radio became common. If another method equally effective with the summoning gun is available, that method may be used. It is essential that the summons, by whatever means, be understood, and it is admitted that there may be many causes which might make summons by radio ineffective.

"*Proceed as directed.*"—In the unratified treaty of the Washington Conference of 1921 on the "Use of Submarines and Noxious Gases in Warfare", Article I, there was the following:

"A merchant vessel must be ordered to submit to visit and search to determine its character before it can be seized.

"A merchant vessel must not be attacked unless it refuse to submit to visit and search after warning, or to proceed as directed after seizure." (1921 Naval War College, International Law Documents, p. 330.)

The words of this paragraph were discussed as regards submarines at the Naval War College. (1926 Naval War College, International Law Situations, pp. 42, *et seq.*).

In 1926 it was stated that as to submarines—"there would be some doubt as to the meaning of the words 'to proceed as directed after seizure.'" There was also uncertainty as to the significance of the words "capture" and "seizure" used in Article I.

The late Admiral Harry S. Knapp, U. S. N., in 1924, published an article in which he predicted that this convention, if adopted, would be a regrettable restriction upon any attempt to formulate the laws of war.

The failure of this treaty to receive approval of the signatory powers left many questions open, and a part of these came before the London Naval Conference of 1930.

American aircraft over Mexico, 1919.—American troops in 1919 crossed the Mexican frontier, the American Government affirming on August 26 that it could not

"be expected to suffer the indefinite continuance of existing lawless conditions along its border which expose its citizens to maltreatment at the hands of ruffianly elements of the Mexican population which their Government seems unable to control, and which have undoubtedly been encouraged to continue their acts of aggression against citizens of the United States by reason of the immunity from punishment for such acts which they have enjoyed.

"No violation of the national sovereignty of Mexico was intended by this expedition. It was despatched upon the hot trail of the bandits in question with the sole object of punishing them for their mistreatment of officers of the American Army, and of preventing future activities of a similar nature upon our frontier. This object, having been accomplished as far as was possible in the circumstances, orders have been issued for the return of the troops to American territory" (Foreign Relations, U. S., 1919, vol. II, p. 560).

A few days later the Mexican Ambassador, on September 1, communicated to the Secretary of State that—

"It has been reported to my Government during the afternoon of the 28th of August, 1919, two aeroplanes of the United States which came from and afterward returned in the direction of Ojinaga flew over the city of Chihuahua and although this is the first time that U. S. aeroplanes flew over that city, they are known to cross the boundary line of the two Republics daily.

"And, in compliance with instructions received from my Government, I have the honor to bring the foregoing to Your Excellency's knowledge and to ask that you kindly use your good offices in having the facts complained of duly investigated in order that those found guilty be punished and repetition of violations like those above stated be prevented.

"I duly thank Your Excellency [etc.]

Y. BONILLAS"

(Ibid., p. 561.)

On September 8, 1919, the Secretary of State said that the "War Department promises to issue strict orders against repetitions."

The Mexican Ambassador sent a further communication to the Secretary of State on October 25, 1919:

"It has been reported to my Government that on the 23rd of of this month, at eleven a. m., an army aeroplane from Douglas, Arizona, flew at a height of about eight hundred meters above Nogales, Arizona, near the boundary line. The crew fired a machine gun several times, and some of the bullets carried as far as Nogales, Sonora, one hitting a dwelling where it luckily caused no bodily injury.

"Under instructions received to that effect from my Government, I have the honor to bring the foregoing to Your Excellency's knowledge with a request that you kindly use your good offices to have the facts investigated and suitable punishment brought upon those who may be found guilty.

"I take [etc.]

Y. BONILLAS."

(Ibid., 564.)

To this communication the Acting Secretary of State replied on December 26:

"With further reference to Your Excellency's note No. E–4670 of October 25, 1919, concerning a report to the effect that on October 23rd the crew of a United States Army Aeroplane fired into the town of Nogales, Sonora, I have the honor to say that I am now in receipt of a communication from the branch of this Government to which the matter was referred stating that a careful investigation fails to disclose such an occurrence on October 23rd. I am officially informed, however, that a Lieutenant in the Air Service of the United States Army is being tried by a General Court Martial on the charge of having fired into the town of Nogales on October 19, 1919.

"Accept [etc.]

FRANK L. POLK."

(Ibid., p. 565.)

Aircraft in distress, etc.—While naval vessels in distress have been allowed to enter neutral jurisdiction for

repairs necessary to make the vessel seaworthy, the obligation to intern a belligerent aircraft entering neutral jurisdiction is comprehensive except for flying ambulances and aircraft upon vessels of war.

During the World War, 1914–18, no exceptions were made for disability, error, fog, or other reasons. Aircraft crossing a neutral frontier were shot down—in some cases on sight. This accords with the rules subsequently drawn up at The Hague, 1923:

"Article 40.

"Belligerent military aircraft are forbidden to enter the jurisdiction of a neutral State. * * *

"Article 42. A neutral Government must use the means at its disposal to prevent the entry within its jurisdiction of belligerent military aircraft and to compel them to alight if they have entered such jurisdiction.

"A neutral Government shall use the means at its disposal to intern any belligerent military aircraft which is within its jurisdiction after having alighted for any reason whatsoever, together with its crew and the passengers, if any." (1924 Naval War College, International Documents, pp. 131, 133.)

The obligation to intern the aircraft also extends to passengers, personnel, and contents. The report of the Commission of Jurists in 1923 says of internment,

"It is an obligation owed to the opposing belligerent and is based upon the fact that the aircraft has come into an area where it is not subject to attack by its opponent." (Ibid., p. 133.)

Aircraft and neutral jurisdiction.—During the World War the question of the relation of aircraft to neutral jurisdiction for the first time became one of major importance. In general, entrance by belligerent aircraft to the air above neutral territory was prohibited. Questions as to entrance of the air above neutral territorial waters arose and this right was denied. Aircraft resting upon and remaining upon vessels of war were regarded as parts of the vessel and the vessel was not discriminated against because having aircraft. Aircraft carriers are not to be excluded if other vessels of war are admitted though the aircraft must remain on the carrier.

Mr. J. M. Spaight says of aircraft and neutral jurisdiction:

"The important question whether the laws of neutrality allow belligerent military aircraft to come and go in neutral jurisdiction was answered by the practice of 1914–18 with a firm and unmistakable negative. The unanimity of the answer was remarkable. All the neutral States who had occasion to decide the question decided it in the same general way, and their decision gave rise to no protest on the part of the belligerents concerned, with one single exception, which the subsequent action and compliance of the State making it deprived of all its force. The Netherlands, Switzerland, Denmark, Norway, Sweden, Spain, and Italy, Roumania, Bulgaria, and China, while still neutral, showed by words or acts or both that they adhered to the principle of prohibition of belligerent air entry, coupled with the obligation of the neutral State to intern any aircraft and airmen effecting entry in face of such prohibition. How general was the acceptance of this principle was shown by the fact that even in Persia, in which British, Russian, and Turkish land forces had been already fighting for two years, an attempt was made to intern a British pilot—Lieut. Browning—when he flew to Teheran in January, 1918. His aeroplane had been stripped of its machine-guns and other armament on the Persian frontier—"so that he should not violate neutrality," says Lieut. Col Tennant—but, notwithstanding this, the Swedish gendarmerie at Teheran proposed to intern him, and were only prevented from doing so by the Cossacks who were present in superior numbers to the Swedes." (Air Power and War Rights, 2d ed., p. 421.)

Admiral Richmond on rules for aircraft.—The Washington Naval Conference of 1921–22 proposed an agreement restricting the use of submarines which was never ratified. At the London Naval Conference of 1930 the submarine was for certain purposes put under the rules for surface vessels of war. Of this Admiral Richmond, writing a few years later, said:

"The Conference which sat in London agreed that it is contrary to humanity that merchant ships should be sunk by submarines, and that the rules which govern surface vessels apply with equal weight to submarines: that is to say, that the act of sinking a merchant ship by means of a torpedo was condemned. It is curious that the same rules should not have been applied to the air flotilla, for there is no intrinsic difference between sinking a vessel with a torpedo fired from an underwater craft, and sinking her with a torpedo fired or a bomb from a craft which navigates above the surface. Presumably, the conduct of aircraft was imagined to be a matter of 'air warfare' with which the Conference had nothing to do: if so, it illustrates how un-

fortunate it is to approach questions of this kind in the subjective manner. If aircraft had been recognised to be what they are, flying torpedo-boats and gun-boats, units of sea power, this illogical discrimination could not have been made." * * *

"If, however, it should be resolutely declared that what is not tolerable in a submarine is not tolerable in any other form of vessel: that weakness or technical inability to fulfil certain conditions does not release an instrument from obligations which bind other instruments; then it would follow that this form of attack [sinking surface craft] was illegal. Illegality, it may be said, does not matter: each nation may have its own view on that question; and though one may elect to consider an act illegal, that decision has no binding effect upon another who thinks otherwise, and to whom the particular practice appears advantageous. But illegality is not so easily disposed of. It is a maxim that illegal acts justify retaliation. Those who consider attack in this form upon the noncombatant merchant ship to be illegal are at complete liberty to warn those who take the other view that they hold themselves entirely free to adopt whatever measures of retaliation they may choose. If the civilian in the ship is to be shot or drowned; if instead of legal condemnation by a Prize Court, summary execution is to be the practice; and if direct protection against these abnormal practices should prove, in the nature of things, to be impossible, the people threatened with this form of sea-hooliganism may find itself constrained to use measures equally detestable and more far-reaching. The bombardment of the civilian on the sea may be answered by the bombardment of the civilian in coastal towns and cities. Where it would end, it is impossible to say. What is called 'civilisation' had produced, until the War of 1914–18, certain agreements to limit the acts of war. It was recognised that indiscriminate conduct was, in the end, disadvantageous: that it caused suffering while doing nothing towards attaining the final object of war, which is Peace. The removal of those restraints upon certain forms of warfare profited no one in the recent war, and, from the profound hatreds which were created, has been one of the principal obstacles in the resumption of peace." (Admiral Sir Herbert Richmond, "Sea Power in the Modern World", pp. 146–49.)

Netherlands American Steam Navigation Co. v. *H. M. Procurator General*, 1925.—The detention by British authorities for forty-one days in 1915 of a vessel belonging to a Netherlands American Company led to a claim for the loss of the use of the vessel. This claim in appeal from the War Compensation Court came before the King's Bench Division of the High Court of Justice and judgments were delivered November 9, 1925. The Court through Bankes L. J., stated:

"There is no dispute about the facts, which can be stated quite shortly. Early in the month of October, 1915, the respondents' vessel, the *Sommelsdijk*, was on a voyage from Buenos Ayres to Helsingborg and Malmo with a cargo of maize, linseed and bran. On or about October 15, when the vessel entered the Downs, she was detained by H. M. Naval Patrols and searched, as far as it was possible to search her, without discharging her cargo and bunkers. The detention in the Downs continued until October 25, when an armed guard and a pilot were placed on board, and orders were given that the vessel was to proceed to London, and then, quoting the language of the master in para. 13 of his affidavit: 'The ship was taken to Gravesend accompanied by a torpedo-boat from the Edinburgh Channel, and brought to an anchor at Gravesend,' and from Gravesend the vessel was taken up into the Royal Albert Dock and there thoroughly searched, her cargo for that purpose being discharged After the search was completed, the cargo was reloaded, and ultimately on December 5, again quoting the master's language: 'The ship was allowed to resume her voyage.' * * * The question for decision in the present case is whether the modern practice of carrying out the right of visit and search constitutes a seizure within the meaning of the commission. In the absence of any authority to the contrary it would seem that the means adopted under the present practice of carrying out a visit and search would amply justify a finding of a seizure. What more is wanted than the forcible detention of a vessel, followed by the placing of an armed guard on board in order to compel the carrying out of orders that the vessel is to proceed to some named port and there to remain until allowed to proceed?" (Netherlands American Steam Navigation Company *v.* H. M. Procurator General, 1 K. B. [1926] 84, 93.)

In this case Scrutton, L. J., said:

"What had happened to the *Sommelsdijk* was agreed by counsel to be that in exercise of the belligerent rights of search she had been detained in the Downs, then brought to London with an armed crew of forces of the Crown on board and in charge of one of His Majesty's destroyers, there searched and ultimately released.

"It was common ground that before the war the belligerent right of search of neutral vessels was usually exercised at sea, but that during the war the presence of submarines and the size of modern ships led to an extension of that procedure, by which the neutral ship was brought into port for examination, without being necessarily brought before the Prize Court for adjudication. Oppenheim (International Law, vol. ii., 429) speaks of capture or seizure 'because grave suspicion demands a further enquiry which can be carried out in a port only.' and (184) that 'seizure is effected by securing possession of the vessel through the captor sending an officer and some of his own crew on board,' or directing her to steer according to the captor's orders. I cannot doubt that what happened here was a 'seizure,' the legality of which could be investigated in the Admiralty sitting in Prize, which

also would deal with any claim for compensation for undue delay in seizure and examination. The President informed us that such matters had been frequently dealt with by the Admiralty sitting in Prize, and we were supplied with a list of cases supporting his view." (Ibid., 97.)

Atkin, L. J., concurring in the same case, said:

"If there were an immediate intention at the commencement of the operation to bring the vessel in for adjudication, there would be an obvious capture, and in my opinion it makes no difference that the present intention is to bring her in for search, with the further intention if the search results in a particular way to have the vessel or goods adjudicated. It cannot be doubted that the practice of the Prize Court in this country has been to act on this view. I have no doubt myself that in proper circumstances the owners of a vessel or goods so brought in for search alleging unreasonable delay may apply to the Prize Court for relief, and that the Prize Court has jurisdiction in such a case to order release; and further has jurisdiction to award compensation if the ship has been brought in for search unreasonably or otherwise in the course of the search has been treated unreasonably. It would be remarkable if the result were otherwise, for in the absence of domestic legislation in the belligerent country the neutral owner would apparently be without remedy." (Ibid., 100.)

Radio.—The use of wireless telegraphy early in the twentieth century had shown that international regulations were essential, because some of the proposed national restrictions would not be generally acceptable. Regulations as to use of wireless telegraphy in time of peace were not particularly difficult to devise as is evident in the Berlin Convention of 1906, in the London Convention, 1912, and in others of later date. The restrictions upon the erection of wireless stations and use of wireless telegraphy in time of war in neutral territory, provided in V Hague Convention of 1907, covered only a part of the problems that soon arose. The proclamations and decrees during the world war varied greatly in character and effectiveness, and an attempt was made to set forth the rules for the use of radio and aircraft in the Report of the Commission of Jurists, The Hague, 1923.

The Hague Convention V of 1907 had forbidden the erection by belligerents of a wireless or like station on neutral territory or the use of such installation established before the war for military purposes unless it had also been open for service of public messages.

On the outbreak of the World War, Switzerland, August 2, 1914, forbade the installation of new radio stations and the use of existing stations.

Some states included under the prohibited means of communication, optical apparatus, lights, flags, etc., and required dismantling of radio apparatus on all vessels entering their waters. The use of radio except on Canal business was forbidden by the United States to all belligerent vessels in the Panama Canal Zone. The regulations in regard to the use of radio issued by South American states were often very detailed.

In referring to summons by aircraft in the Naval War College, International Law Situations, 1930, it was said:

"Summons of a merchant vessel is the means by which the attention of such a vessel is drawn to a vessel of war which desires to communicate with the merchant vessel. The summons may be by signal flag or by an other effective method. There is not any necessary implication that the use of force is contemplated. Visit and search may or may not follow the summons. There seems to be no reason why the use of radio may not be as lawful as any other means of attracting attention or why an aircraft may not summon a merchant vessel as well as any other craft." (1930 Naval War College, International Law Situations, p. 102.)

Résumé.—In the Naval War College International Law Situations, 1930, pages 98 to 135, there is a discussion of the use of aircraft. It was shown that practice and court decisions logically regarded an aircraft attached to a vessel and the personnel of the aircraft as a part of the equipment and personnel of the vessel of war. The British and to some degree the Italian point of view favored deviation for visit and search. "To proceed as

directed" after seizure, unless under escort, or after a prize crew had been placed upon the seized vessel, is not an accepted obligation under international law. Some states decline to admit any obligation to the belligerents as resting upon its vessels to follow a routing unless the force to make the orders effective is present, and only so long as it is present. In every case the orders of the visiting vessels whether naval or air craft, must be made known to and be understood by the visited craft before responsibility for carrying out the orders can be presumed. Upon the high sea vessels may be met whose radio apparatus may not be working or the instructions may be misunderstood.

During the early stages of the development of aircraft, there was uncertainty as to the obligations of neutral states in regard to the use of the superjacent air by belligerents. Gradually the absolute prohibition of such use became the accepted rule. Of course, in case of distress an aircraft might seek a landing in neutral jurisdiction but it would be interned with the personnel. Aircraft might be brought within neutral jurisdiction on a vessel which might lawfully be permitted to enter, but they must not be separated from the vessel under liability to internment.

SOLUTION

(*a*) 1. The *Ya–10* should not use force against the *Xala* till certain that the *Xala* has received and understood the summons. When certain that summons has been received and is understood, the *Ya–10* may use force sufficient only to bring the *Xala* to the *Yaga* under escort or in case of persistent or active resistance, the *Ya–10* may sink the *Xala*, after assuring the safety of passengers, crew, and papers.

2. The *Ya–10* should not use force against the *Xala* till certain that the *Xala* has received and understood

the summons. When certain that summons has been received and is understood, the *Ya–10* may use force sufficient only to bring the *Xala* to the *Yaga* under escort or in case of persistent or active resistance, the *Ya–10* may sink the *Xala*, after assuring the safety of passengers, crew, and papers.

3. The *Ya–10* should not use force against the *Xala* till certain that the *Xala* has received and understood the summons. When certain that summons has been received and is understood, the *Ya–10* may use force sufficient only to bring the *Xala* to the *Yaga* under escort. If the *Ya–10* decides not to incur risk from the approaching cruiser of X, the *Ya–10* may take no further action in regard to the *Xala*.

4. If a merchant vessel of neutral state N, the *Nela*, should be summoned by the *Ya–10* under conditions identical to (1), (2), and (3) above, the same action may be taken.

(*b*) The commander of the *Ya–10* being already certain that the summons is received, should also be certain that it is understood, when he may proceed as in (1), (2), (3), and (4) above.

(*c*) 1. State K should use due diligence to intern the *Pa–11*, an aircraft of state Y.

2. State O should use due diligence to intern the *Pa–11*, an aircraft of state Y, and if the tanker of state Y has furnished fuel to the *Pa–11*, should intern the tanker.

3. State R should request the *Yema* to turn over the *Pa–11* for internment and if the request is not granted, should use due diligence to intern the *Yema* with the *Pa–11* on board.

SITUATION III

NEUTRALITY, 1914–1936

In what respects has the attitude of the United States as a neutral changed in the period from August 4, 1914, to February 29, 1936?

CONCLUSION

From August 4, 1914, to April 6, 1917, the United States, as a neutral state, followed its long established neutrality policy which was in general accord with accepted international law.

The Joint Resolution of February 29, 1936, embodied a nationalistic policy in many respect divergent from the prior policy of the United States and from the generally accepted doctrines of international law.

The change in 1935–36 to a doctrine for the most part nationalistic has placed nationals of the United States under restrictions beyond those imposed by international law.

NOTES

Domestic neutrality regulation.—Since late in the eighteenth century, it has been customary for states to adopt neutrality laws in order that their citizens might, in advance, know their rights and duties in case of foreign war. Foreign states might, if contemplating war, properly estimate the significance of these laws in laying out war plans. A state might, if planning for war against a state having a large commerce with a state the neutrality laws of which prohibited export of all

articles of the nature of contraband, find the laws of the neutral more serviceable than the maintenance of a force to visit and search the neutral ships for contraband.

The accepted international laws of neutrality apply in relations with states not parties to treaty agreements upon special neutrality laws. Confusion may therefore arise in regard to the rights of neutral citizens under identical situations but with respect to different states. Domestic neutrality laws do not necessarily imply any reciprocal regulations among other states. Domestic laws which embody the rights and duties which a state proposes to maintain must, to be internationally effective, approximate the generally accepted international law of neutrality. Any wide departure from this law may give rise to claims upon the part of one or the other belligerent, or in certain cases on the part of another neutral.

Attitude of the United States.—The United States has considered itself as the great leader in the development of the law of neutrality. The position of the United States defined by Washington, April 22, 1793, embodied in the Act of Congress of June 5, 1794, and in the neutrality laws of 1818, clarified the principles of neutrality as understood in the United States in the early part of the nineteenth century.

It is evident that some of the confusion in regard to neutrality was consequent upon the lack of definiteness in regard to the concept of war. An imperfect war might have as a corollary an imperfect neutrality. The existence of privateering added to the difficulty in demanding and in enforcing exact conformity to any rules.

The Declaration of Paris of April 16, 1856, announcing the abolition of privateering, prescribing the treatment of enemy and of neutral goods and defining effective blockade, while not adhered to by the United

States, was followed by a convention with Peru, signed July 22, 1856, and containing similar provisions in regard to goods which, in the preamble, were stated to be "in accordance with the present state of civilization" and as "permanent and immutable."

Accepted restrictions.—Since the Treaty of Washington, 1871, and the Geneva Award in the case of the *Alabama*, neutrality proclamations have usually prohibited the sending out of the jurisdiction any vessel built, armed, or equipped within the jurisdiction with the intent that it should be employed in the service of a belligerent then engaged in war. It has been proposed that this principle be extended to a much wider range so as to include aircraft, tanks and similar instruments of war. Some have suggested extending the prohibited list of all war material.

The internationally accepted restrictions apply, however, to ships built or sent out under contract or with intent to serve one of the belligerents and not to all the articles or materials that the belligerent might include in a list of contraband. Neutrals under ordinary conditions maintain that the burden of the war should rest upon the belligerents and that neutrals so far as possible be free from interference.

Whether the principles set forth by Pinckney, Marshall, and Gerry in 1798 in a long communication to the French Minister of Exterior Relations, Talleyrand, still apply may be debated. They said:

"The right of one nation to exchange with another the surplus produce of its labour, for those articles which may supply its wants or administer to its comfort, is too essential to have been ever classed among those admitted to be in any degree doubtful. It is a right in ceding which a nation would cede the privilege of regulating its own interests and providing for its own welfare. When any two nations shall choose to make war on each other, they have never been considered, nor can they be considered as thereby authorizing themselves to impair the essential rights of those who may choose to remain at peace. Consequently these rights, the free exercise of which is

essential to its interest and welfare, must be retained by a neutral power, whatever nations may be involved in a war.

"The right of a belligerent to restrain a neutral from assisting his enemy by supplying him with those articles which are defined as contraband, has been universally submitted to; but to cut off all intercourse between neutrals and an enemy, to declare that any single article which may have come from the possessions of an enemy, whoever may be its owner, shall of itself be sufficient to condemn both vessel and cargo, is to exercise a control over the conduct of neutrals which war can never give, and which is alike incompatible with their dignity and their welfare.

"The rights of belligerents are the same. If this might be exercised by one, so might it be exercised by every other. If it might be exercised in the present, so it might be exercised in every future war. This decree is, therefore, on the part of France, the practical assertion of a principle which would destroy all direct or circuitous commerce between belligerent and neutral powers, which would often interrupt the business of large portion of the world, and withdraw or change the employment of a very considerable portion of the human race.

"This is not all. It is the exercise of a power which war is not admitted to give, and which, therefore, may be assumed in peace as well as war.

"It essentially affects the internal economy of nations, and deranges that course of industry which they have a right to pursue, and on which their prosperity depends.

"To acquiesce, therefore, in the existing state of things, under a principle so extensive and so pernicious, is to establish a precedent for national degradation which can never cease to apply, and which will authorize any measures which power may be disposed to practise." (3 State Papers of the U. S., 1797–1801, p. 298.)

Proclamation of neutrality, United States, 1914.— The President of the United States issued a proclamation on August 4, 1914, setting forth in considerable detail the attitude of the Government upon the subject of neutrality.

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

Whereas a state of war unhappily exists between Austria-Hungary and Servia and between Germany and Russia and between Germany and France; And Whereas the United States is on terms of friendship and amity with the contending powers, and with the persons inhabiting their several dominions;

And Whereas there are citizens of the United States residing within the territories or dominions of each of the said belligerents

and carrying on commerce, trade, or other business or pursuits therein;

And Whereas there are subjects of each of the said belligerents residing within the territory or jurisdiction of the United States, and carrying on commerce, trade, or other business or pursuits therein;

And Whereas the laws and treaties of the United States, without interfering with the free expression of opinion and sympathy, or with the commercial manufacture or sale of arms or munitions of war, nevertheless impose upon all persons who may be within their territory and jurisdiction the duty of an impartial neutrality during the existence of the contest;

And Whereas it is the duty of a neutral government not to permit or suffer the making of its waters subservient to the purposes of war;

Now, Therefore, I, Woodrow Wilson, President of the United States of America, in order to preserve the neutrality of the United States and of its citizens and of persons within its territory and jurisdiction, and to enforce its laws and treaties, and in order that all persons, being warned of the general tenor of the laws and treaties of the United States in this behalf, and of the law of nations, may thus be prevented from any violation of the same, do hereby declare and proclaim that by certain provisions of the act approved on the 4th day of March, A. D. 1909, commonly known as the "Penal Code of the United States" the following acts are forbidden to be done, under severe penalties, within the territory and jurisdiction of the United States, to-wit:—

1. Accepting and exercising a commission to serve either of the said belligerents by land or by sea against the other belligerent.

2. Enlisting or entering into the service of either of the said belligerents as a soldier, or as a marine, or seaman on board of any vessel of war, letter of marque, or privateer.

3. Hiring or retaining another person to enlist or enter himself in the service of either of the said belligerents as a soldier, or as a marine, or seaman on board of any vessel of war, letter of marque, or privateer.

4. Hiring another person to go beyond the limits or jurisdiction of the United States with intent to be enlisted as aforesaid.

5. Hiring another person to go beyond the limits of the United States with intent to be entered into service as aforesaid.

6. Retaining another person to go beyond the limits of the United States with intent to be enlisted as aforesaid.

7. Retaining another person to go beyond the limits of the United States with intent to be entered into service as aforesaid. (But the said act is not to be construed to extend to a citizen or subject of either belligerent who, being transiently within the United States, shall, on board of any vessel of war, which, at the time of its arrival within the United States, was fitted and equipped as such vessel of war, enlist or enter himself or hire or retain another subject or citizen of the same belligerent, who is transiently within the United States, to enlist or enter himself to serve such belligerent on board such vessel of war, if the United States shall then be at peace with such belligerent.)

8. Fitting out and arming, or attempting to fit out and arm, or procuring to be fitted out and armed, or knowingly being concerned in the furnishing, fitting out, or arming of any ship or vessel with intent that such ship or vessel shall be employed in the service of either of the said belligerents.

9. Issuing or delivering a commission within the territory or jurisdiction of the United States for any ship or vessel to the intent that she may be employed as aforesaid.

10. Increasing or augmenting, or procuring to be increased or augmented, or knowingly being concerned in increasing or augmenting, the force of any ship of war, cruiser, or other armed vessel, which at the time of her arrival within the United States was a ship of war, cruiser, or armed vessel in the service of either of the said belligerents, or belonging to the subjects of either, by adding to the number of guns of such vessels, or by changing those on board of her for guns of a larger calibre, or by the addition thereto of any equipment solely applicable to war.

11. Beginning or setting on foot or providing or preparing the means for any military expedition or enterprise to be carried on from the territory or jurisdiction of the United States against the territories or dominions of either of the said belligerents.

And I do hereby further declare and proclaim that any frequenting and use of the waters within the territorial jurisdiction of the United States by the armed vessels of a belligerent, whether public ships or privateers, for the purpose of preparing for hostile operations, or as posts of observation upon the ships of war or privateers or merchant vessels of a belligerent lying within or being about to enter the jurisdiction of the United States, must be regarded as unfriendly and offensive, and in violation of that neutrality which it is the determination of this government to observe; and to the end that the hazard and inconvenience of such apprehended practices may be avoided, I further proclaim and declare that from and after the fifth day of August instant and during the continuance of the present hostilities between Austria-Hungary and Servia, and Germany and Russia and Germany and France, no ship of war or privateer of any belligerent shall be permitted to make use of any port, harbor, roadstead, or waters subject to the jurisdiction of the United States as a station or place of resort for any warlike purpose or for the purpose of obtaining any facilities of warlike equipment; and no ship of war or privateer of either belligerent shall be permitted to sail out of or leave any port, harbor, roadstead, or waters subject to the jurisdiction of the United States from which a vessel of an opposing belligerent (whether the same shall be a ship of war, a privateer, or a merchant ship) shall have previously departed until after the expiration of at least twenty-four hours from the departure of such last-mentioned vessel beyond the jurisdiction of the United States.

If any ship of war or privateer of a belligerent shall, after the time this notification takes effect, enter any port, harbor, roadstead, or waters of the United States, such vessel shall be required to depart and to put to sea within twenty-four hours after her entrance into such port, harbor, roadstead, or waters, except in case of stress of weather or of her requiring provisions or things

necessary for the subsistence of her crew, or for repairs; in any of which cases the authorities of the port or of the nearest port (as the case may be) shall require her to put to sea as soon as possible after the expiration of such period of twenty-four hours, without permitting her to take in supplies beyond what may be necessary for her immediate use; and no such vessel which may have been permitted to remain within the waters of the United States for the purpose of repair shall continue within such port, harbor, roadstead, or waters for a longer period than twenty-four hours after her necessary repairs shall have been completed, unless within such twenty-four hours a vessel, whether ship of war, privateer, or merchant ship of an opposing belligerent, shall have departed therefrom, in which case the time limited for the departure of such ship of war or privateer shall be extended so far as may be necessary to secure an interval of not less than twenty-four hours between such departure and that of any ship of war, privateer, or merchant ship of an opposing belligerent which may have previously quit the same port, harbor, roadstead, or waters. No ship of war or privateer of a belligerent shall be detained in any port, harbor, roadstead, or waters of the United States more than twenty-four hours, by reason of the successive departures from such port, harbor, roadstead, or waters of more than one vessel of an opposing belligerent. But if there be several vessels of opposing belligerents in the same port, harbor, roadstead, or waters, the order of their departure therefrom shall be so arranged as to afford the opportunity of leaving alternately to the vessels of the opposing belligerents, and to cause the least detention consistent with the objects of this proclamation. No ship of war or privateer of a belligerent shall be permitted, while in any port, harbor, roadstead, or waters within the jurisdiction of the United States, to take in any supplies except provisions and such other things as may be requisite for the subsistence of her crew, and except so much coal only as may be sufficient to carry such vessel, if without any sail power, to the nearest port of her own country; or in case the vessel is rigged to go under sail, and may also be propelled by steam power, then with half the quantity of coal which she would be entitled to receive, if dependent upon steam alone, and no coal shall be again supplied to any such ship of war or privateer in the same or any other port, harbor, roadstead, or waters of the United States, without special permission, until after the expiration of three months from the time when such coal may have been last supplied to her within the waters of the United States, unless such ship of war or privateer shall, since last thus supplied, have entered a port of the government to which she belongs.

And I do further declare and proclaim that the statutes and the treaties of the United States and the law of nations alike require that no person, within the territory and jurisdiction of the United States, shall take part, directly or indirectly, in the said wars, but shall remain at peace with all of the said belligerents, and shall maintain a strict and impartial neutrality.

And I do hereby enjoin all citizens of the United States, and all persons residing or being within the territory or jurisdiction

of the United States, to observe the laws thereof, and to commit no act contrary to the provisions of the said statutes or treaties or in violation of the law of nations in that behalf.

And I do hereby warn all citizens of the United States, and all persons residing or being within its territory or jurisdiction that, while the free and full expression of sympathies in public and private is not restricted by the laws of the United States, military forces in aid of a belligerent cannot lawfully be originated or organized within its jurisdiction; and that, while all persons may lawfully and without restriction by reason of the aforesaid state of war manufacture and sell within the United States arms and munitions of war, and other articles ordinarily known as "contraband of war", yet they cannot carry such articles upon the high seas for the use or service of a belligerent, nor can they transport soldiers and officers of a belligerent, or attempt to break any blockade which may be lawfully established and maintained during the said wars without incurring the risk of hostile capture and the penalties denounced by the law of nations in that behalf.

And I do hereby give notice that all citizens of the United States and others who may claim the protection of this government, who may misconduct themselves in the premises, will do so at their peril, and that they can in no wise obtain any protection from the government of the United States against the consequences of their misconduct.

In Witness Whereof I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the city of Washington this fourth day of August in the year of our Lord one thousand nine hundred and fourteen and of the independence of the United States of America the one hundred and thirty-ninth.

[SEAL] WOODROW WILSON

By the President:
WILLIAM JENNINGS BRYAN,
Secretary of State.

[No. 1272.]

This proclamation was issued "to preserve the neutrality of the United States and of its citizens and of persons within its territory and jurisdiction, and to enforce its laws and treaties." The proclamation stated that the manufacture and sale of "arms and munitions of war, and other articles ordinarily known as 'contraband of war'" was lawful, but that carrying such articles on the high sea "for the use or service of a belligerent" incurred "the risk of hostile capture and the penalties denounced by the law of nations."

Opinions on neutrality.—In recent years particularly since the slogan, "a war to end wars" was current, there has been effort to convince the public that the contest of 1914–18 attained this object. If this is a fact, the argument would run that since war is no more, then neutrality must manifestly be non-existent.

Another line of writers has pointed to the fact that the so-called laws of neutrality did not operate during 1914–18 with such effectiveness as to commend such laws to further respect. These writers would, therefore, substitute other types of control. Many would resort to collective action against a party declared to be the "aggressor" with an expectation that neutrality would then disappear as the states of the world would be aligned either on the side of the "aggressor" or opposed to the "aggressor".

Another group has contemplated hopefully a civilization in which each state will exercise a self-restraint that will make a resort to war no longer possible, which again would make neutrality an unnecessary and obsolete concept.

That there should be no more war is certainly a goal to be desired, but one for which preparation does not seem to be immediately made. States are not repealing their neutrality laws, nor have international conventions relating to neutrality been denounced.

Some states are enacting new neutrality legislation, often with the expectation that this legislation will tend to prevent or to limit hostilities. Other states seem to follow the doctrine that as war is international in character, rules in regard to neutrality should regard international practices.

Referring to the policy of President Wilson in the World War, Newton D. Baker, Secretary of War, 1916–18, says in October 1936:

"President Wilson's real preoccupation throughout this whole period was his interest in the restoration of peace and the establishment of a world system in which peace would be possible. All of his actions are, therefore, to be read with that thought in mind." (Foreign Affairs, vol. 15, p. 38.)

In his correspondence with Senator Stone, President Wilson said:

"To forbid our people to exercise their rights for fear we might be called upon to vindicate them would be a deep humiliation indeed."

Recently there has been some advocacy of the abandonment of neutrality on the ground that any attempt to maintain neutrality would bring a state into war. Some would maintain neutral rights in regard to persons, but abandon neutral rights in regard to property. Others would make a sort of trade agreement with each belligerent at the outbreak of war in regard to what might be done without risk, while still others would allow full freedom of action to the belligerents during the war but make claims for violation of rights at the close of the war.

To such propositions a general reply has been that the rights of neutrality have been developed after many efforts by states desirous of keeping out of war and of exercising their rights, while at the same time conceding to the belligerents rights to conduct the war. Those maintaining this position decline to admit that because one state declares war against another state, all other states shall be bound to allow the belligerent states unrestrained freedom of action except as relates to neutral persons. Some see in the proposal to make agreements with belligerents at the outbreak of war the probability that the number and scope of such agreements would be very restricted and that, if not identical in all cases, conflicting claims would be inevitable. As to the proposition of allowing full freedom of action to the belligerents in expectation of adjustment of claims on the re-

turn of peace, it has been pointed out that such adjustment has not proven entirely practicable under previously existing conditions when the rights of neutrals and belligerents were to a considerable degree defined.

It has been often stated that when the belligerents were relatively strong and the neutrals were weak or vacillating, the belligerents would endeavor to extend their rights by action or by interpretation. This is a natural result but does not offer a valid ground for discarding the law. Similarly the fact that the geography of states differs does not modify the international law applicable though it may modify national policy.

Changing neutrality policy.—It is well-known that a change in opinion upon or a changed attitude toward some principle of international law on the part of one nation does not in itself change the law. Nor does a misunderstanding or ignorance of the law relieve a state of its responsibilities. Even though a state may publish in advance its decision to act in a manner not in accord with international law, this advanced notice does not establish a right to act in this fashion. Many of these problems were discussed during the World War, 1914–18.

Some argued that the desire for profits led states into war and that consequently the elimination of profits would keep a state out of war. Since the attempt to apply economic sanctions in the Italo-Ethiopian controversy, 1935–36, there has been less certainty in regard to this. Others have pointed out that embargoes have tended to promote wars and that the effect of application of such a principle is to reduce small states to subserviency to neighboring states having large military resources. It is pointed out that embargoes operate unequally upon the belligerents; to which it is replied that neutrality also operates unequally.

Since the World War, many new panaceas have been proposed, discussed, and adopted with enthusiasm, only to be abandoned when put to any considerable test. Similarly, many of the laws of neutrality failed to operate effectively during the World War when weak neutrals were unable to defend their rights and when strong neutrals were supine or hesitated to maintain principles long regarded as well established.

Neutral rights have since the seventeenth century been developing in the direction of restriction upon arbitrary action of belligerents. The Armed Neutralities of 1780 and 1800 afforded examples of this, and the Armed Neutralities of 1780 helped to make Washington's proclamation of April 22, 1793, more respected. The failure to maintain neutral rights, which have been gained after years of effort, naturally makes possible the extension of belligerent activities, and the maintenance of neutral rights limits the sphere of belligerent action and usually the area of the war.

The Pact of Paris, August 27, 1928, was ratified by many states and in this they condemn recourse to war for the solution of international controversies and renounce it as an instrument of national policy. It was also hailed as making unnecessary any neutrality laws in the future. At the Habana Conference, February 20, 1928, however, a convention on Maritime Neutrality was signed and soon ratified by American states. The President of the United States proclaimed this convention, May 26, 1932. In this convention it is specifically stated in Article 15 that:

"Of the acts of assistance coming from the neutral states, and the acts of commerce on the part of individuals, only the first are contrary to neutrality."

The legislation of the United States under the Joint Resolution of February 29, 1936, would under this Convention be based wholly upon national policy.

Neutrality in war between Bolivia and Paraguay.—One of the most recent occasions upon which neutrality proclamations were issued was during the war between Bolivia and Paraguay. Some of these referred specifically to the Hague Conventions of 1907 and to the Declaration of London of 1909.

Brazil has customarily issued detailed rules in respect to neutrality. Brazil issued such rules in 1933 and as a recent expression of a state in close proximity to the belligerents these are given in full.

Translation.

(Diario Official, May 31, 1933.)

Decree No. 22,744 of May 23, 1933, orders that complete neutrality shall be observed during the war between Bolivia and Paraguay.

The Chief of the Provisional Government of the United States of Brazil, considering that in view of the deeply lamentable fact of a war between two American nations, to both of which Brazil is closely bound by ties of old friendship, and by those common interests, principles, and feelings of an international order which constitute the characteristic continental atmosphere of America, Brazil is confronted by the imperious necessity of defining its position as a neutral country:

Considering, that not being a member of the League of Nations, Brazil is not bound by the prescriptions of the Pact, and that, having to affirm its neutrality, it is guided by international law, written and customary, and by the elevated spirit of justice and morality which civilization has inculcated in the conscience of cultured peoples;

Considering, that the General Rules of Neutrality adopted by Brazil during the World War, prior to having been drawn into it, and which were established by decree No. 11,037 of August 4, 1914, and completed or modified by subsequent acts, do not fully satisfy the requirements of the present moment, because, at the time of their publication war in another continent was contemplated, the acts of belligerency on the sea being those which would most preoccupy the country, whereas now the strife is between neighboring and mediterranean nations, problems of river navigation have arisen, and while the international spirit has greatly increased during the past years ideas regarding war have changed considerbly;

Considering, that these observations show, further, that the rules regarding neutrality on land and sea, mentioned in Conventions Nos. 5 and 13 of The Hague, in 1907, published in Brazil, which signed them, and approved them by Decree No. 10,719 of February 4, 1914, although positive international law, now demand modifications, inspired by a more firmly based doctrine in order to meet the special situation now presented;

Considering, that while it has not yet ratified the Convention on Maritime Neutrality which it signed in Habana on February 20, 1928,[1] together with the Nations represented at the Sixth Pan-American Conference, Brazil cannot fail to recognize the great value which it has as a concrete expression of the judicial opinion of neutrality consecrated by American international law;

Considering, that regarding contraband of war, closely related to respect for private property, positive law is very deficient; that the Naval Declaration of London, in 1909 has merely doctrinal value; that the idea of Counselor Paranhos, interpreting Brazilian thought, set forth in the communication addressed to the powers signatory to the Declaration of Paris, of April 16, 1856, continues after 76 years have passed, to be aspired to so as to complete the work of peace and civilization expressed in the maxims then proclaimed and serves better to defend unoffending private property;

Considering, however, that in order to settle the incidents which may arise and to govern the actions of Brazil and the Brazilians, there is the general idea of neutrality, which consists in the neutral State abstaining from taking part directly or indirectly in the action of the belligerents; in not disturbing in any way war operations occurring outside of its territory; in not allowing, within it, acts of hostility; and in having assured the freedom of its peaceful commerce, the expression of its sovereignty, which war abroad cannot reasonably limit; deducing from this last proposition that only the normal purpose of the merchandise and its destiny, can influence its classification as hostile or innocent;

Considering, that for years the idea has been developing of placing the people in a more decisive position in favor of peace, which is the normal state of civilization, but that present conditions have not permitted them to obtain positive results in the sense of preventing war and lending to pacific activities the preeminence to which, undoubtedly they are entitled, the principles above mentioned exist;

Considering, finally, that the Federal Government has received official notification from the Paraguayan Government that Paraguay is in a state of war with Bolivia:

Resolves, that while the said state of war lasts the Rules of Neutrality hereto annexed, signed by the Minister of State for Foreign Affairs, shall be strictly observed and complied with by the Brazilian authorities.

Rio de Janeiro, 23rd of May, 1933, 112th of Independence, and 45th of the Republic.

GETULIO VARGAS
AFRANIO DE MELLO FRANCO
AUGUSTO IGNACIO DO ESPIRITO SANDO CARDOSO
PROTOGENES PEREIRA GUIMARÃES

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[1] Ratified by the United States and proclaimed May 26, 1932, see Naval War College, 1935 International Law Situations, Appendix I, p. 115.

Rules of Neutrality of Brazil

Article 1. The residents of the United States of Brazil, nationals or foreigners, should abstain from any participation or aid in favor of the belligerents and should not practice any act that may be considered as hostility toward one of the powers at war.

Article 2. The belligerents shall not be permitted to promote in Brazil the enlistment of their nationals, of Brazilian citizens, or of nationals of other countries, to serve in their armed forces.

Article 3. The agents of the Federal Government or of the States of Brazil are forbidden to export or to favor directly or indirectly the remittance of war material to either of the belligerents.

Article 4. The provision of the preceding article does not prevent the free transit, river or land, assured by treaties in effect between Brazil and either of the belligerents.

Article 5. It is forbidden to the belligerents to make on the land, river, or maritime territory of the United States of Brazil, a base of war operations or to practice acts which may constitute a violation of Brazilian neutrality.

Sole paragraph. Disrespect of neutrality is considered an illicit international act, for which the belligerent will answer, it being permitted however to the neutral State to defend its juridical position.

Article 6. The Federal Government shall use the means at its disposal to prevent the equipment or arming of any vessel which it may have reasonable cause to suppose is destined to engage in hostile operations against one of the belligerents. It shall exercise the same vigilance to prevent the departure from its territory of any vessel destined to cruise or engage in hostile operations and which has been, in waters under its jurisdiction, adapted wholly or in part to the uses of war.

Article 7. In the ports and anchorages of the United States of Brazil, the war vessels of the belligerents, without in any way increasing their military force, may repair, to the extent indispensable to safe navigation, the damages that they may have suffered.

The Brazilian naval authority shall verify the nature of the repairs to be made and which should be made with the greatest speed possible.

Article 8. The vessels referred to in the preceding article may only supply themselves in the ports and anchorages of Brazil:

(1) To complete their normal provision of food in times of peace;

(2) To receive fuel, with which to reach the nearest port of their country, or to complete their stores, properly stated.

Article 9. The war vessels of the belligerents, that take on fuel on a Brazilian port, cannot renew their provisions at the same or another Brazilian port until three months later.

Article 10. The vessels of the belligerents cannot use the ports, anchorages, and territorial waters of Brazil to increase their military supplies, or to complete their crews. They may, however, utilize the services of the pilots of the country.

ARTICLE 11. The provisions of Articles 7 to 9 do not apply to hospital ships, or to those exclusively employed upon scientific, religious, or philanthropic missions.

ARTICLE 12. When belligerent vessels of war are simultaneously present in a Brazilian port or anchorage, at least forty-eight hours should elapse between the departure of one of them and of the adversary.

The order of departure shall be determined by that of arrival, unless the ship that entered first should be included in one of the cases in which an extended stay is allowed.

A belligerent war vessel cannot leave the Brazilian port or anchorage where it may be until forty-eight hours after the departure of a merchant ship flying the flag of her adversary.

ARTICLE 13. The war vessels of the belligerents may normally delay at a Brazilian port or anchorage forty-eight hours. A longer stay will be allowed them:

(1) When the repairs indispensable to the continuance of their journey cannot be finished in less time.

(2) When there is a material impediment to their departure.

The Federal Government shall determine, according to circumstances, the length of the delay of the vessel.

ARTICLE 14. If, in spite of notification made by the property authority, the belligerent war vessel does not leave the Brazilian port, the Federal Government shall take the measures considered necessary to render the ship incapable of navigating for the duration of the war.

Should the commander of the belligerent vessel not wish to heed the notification received, for an unacceptable reason, the Federal Government shall order its military authorities to use force, so that its decision shall be complied with.

ARTICLE 15. When a belligerent vessel has to be detained in Brazil the officers and crew shall also be held.

The officers and the crew may be lodged in another ship or on land and may be subjected to the restrictive measures which seem necessary to impose. However, there will be kept on board the war vessel the men required for its preservation. The officers may remain at liberty, by signing a written obligation under word of honor that they will not leave the place designated on Brazilian territory, without authorization from the Minister of Marine.

ARTICLE 16. The captures made by either of the belligerents may only be brought to a Brazilian port on account of failure of navigation, bad weather, lack of fuel or food supplies, or to discharge merchandise destined for Brazil.

ARTICLE 17. The war vessels, which, being pursued by the enemy, and which, to avoid immediate attack, take refuge in a Brazilian port, will be detained there and disarmed.

ARTICLE 18. Troops or isolated soldiers who cross the frontiers of Brazil shall be disarmed or interned far from the seat of war. The officers may remain at liberty under the conditions established in Article 15, second part, *in fine*, the Minister of War being in this case the proper authority to permit the retirement of those interned from the place designated for their residence.

ARTICLE 19. Escaped prisoners who take refuge in Brazil will remain at liberty, a place of residence, however, may be designated for them when this measure appears necessary.

ARTICLE 20. Interned belligerents shall be treated according to the precepts of international law.

ARTICLE 21. Belligerent airplanes may not fly over the territory or jurisdictional waters of Brazil without previous authorization. Those not authorized that land on Brazilian territory or waters will be detained.

Military airplanes will not be given authorization to fly over Brazilian territory.

RIO DE JANEIRO, *May 23, 1933.*

AFRANIO DE MELLO FRANCO.
Ministry of foreign affairs.

National and international neutrality laws.—A state may at its discretion restrict the range of action of its nationals when it is a neutral. Domestic neutrality laws do not necessarily have any effect upon the international law of neutrality either in limiting or extending its scope. The nationals of a state are responsible for the observance of its laws. In 1912 the Acting Secretary of State, after referring to the Hague Conventions of 1907 in regard to neutrality and to the general laws of neutrality, said of the American neutrality laws:

"The situation is somewhat different, however, with reference to the so-called neutrality statutes which have been enacted by this Government, which, going beyond the provisions of international law, as set forth in the above-quoted extracts of the convention, do make illegal certain acts specified in the statutes, even when no state of belligerency exists, such acts being directed against the established government of a country with which this Government is at peace. But, as your excellency will at once recognize, and as has been heretofore declared by this Department, the duties of neutrality under the law of nations can not be either expanded or contracted by national legislation. The United States, for instance, has here in excessive caution required from its citizens duties more stringent than those imposed by the law of nations; but those statutes, while they may make offenders penally liable in this country do not themselves put either these persons or this Government under any extraterritorial obligation. Our own statutes bind only our own Government and citizens and those within our jurisdiction. If they impose on us a larger duty than is imposed upon us by international law, they do not correspondingly enlarge our duties to foreign nations." (Foreign Relations, U. S., 1912, p. 741.)

Act of Congress, March 14, 1912.—The United States has found it desirable to prohibit exportation of arms or munitions of war even when a condition of domestic violence and not of war exists. The Act of Congress of March 14, 1912, provides:

"That whenever the President shall find that in any American country conditions of domestic violence exist which are promoted by the use of arms or munitions of war procured from the United States, and shall make proclamation thereof, it shall be unlawful to export except under such limitations and exceptions as the President shall prescribe any arms or munitions of war from any place in the United States to such country until otherwise ordered by the President or by Congress." (37 Stat. 630.)

Neutrality and contraband, 1914.—In 1914 there were new problems arising owing to changing conditions in the conduct of war. These came in increasing number to the Department of State, and a general circular was issued.

Circular of the Department of State of the United States with Reference to Neutrality and Trade in Contraband. October 15, 1914.

The Department of State has received numerous inquiries from American merchants and other persons as to whether they could sell to governments or nations at war contraband articles without violating the neutrality of the United States, and the Department has also received complaints that sales of contraband were being made on the apparent supposition that they were unneutral acts which this Government should prevent.

In view of the number of communications of this sort which have been received it is evident that there is a widespread misapprehension among the people of this country as to the obligations of the United States as a neutral nation in relation to trade in contraband and as to the powers of the executive branch of the government over persons who engage in it. For this reason it seems advisable to make an explanatory statement on the subject for the information of the public.

In the first place it should be understood that, generally speaking, a citizen of the United States can sell to a belligerent government or its agent any article of commerce which he pleases. He is not prohibited from doing this by any rule of international law, by any treaty provisions, or by any statute of the United States. It makes no difference whether the articles sold are exclusively for war purposes, such as firearms, explosives, etc., or are foodstuffs, clothing, horses, etc., for the use of the army or navy of the belligerent.

Furthermore, a neutral government is not compelled by international law, by treaty, or by statute to prevent these sales to a belligerent. Such sales, therefore, by American citizens do not in the least affect the neutrality of the United States.

It is true that such articles as those mentioned are considered contraband and are, outside the territorial jurisdiction of a neutral nation, subject to seizure by an enemy of the purchasing government, but it is the enemy's duty to prevent the articles reaching their destination, not the duty of the nation whose citizens have sold them. If the enemy of the purchasing nation happens for the time to be unable to do this that is for him one of the misfortunes of war; the inability, however, imposes on the neutral government no obligation to prevent the sale.

Neither the President nor any executive department of the Government possesses the legal authority to interfere in any way with trade between the people of this country and the territory of the belligerent. There is no act of Congress conferring such authority or prohibiting traffic of this sort with European nations, although in the case of neighboring American Republics Congress has given the President power to proclaim an embargo on arms and ammunition when in his judgment it would tend to prevent civil strife.

For the Government of the United States itself to sell to a belligerent nation would be an unneutral act, but for a private individual to sell to a belligerent any product of the United States is neither unlawful nor unneutral, nor within the power of the Executive to prevent or control.

The foregoing remarks, however, do not apply to the outfitting or furnishing of vessels in American ports or of military expeditions on American soil in aid of a belligerent. These acts are prohibited by the neutrality laws of the United States.

DEPARTMENT OF STATE,
October 15, 1914.

(Foreign Relations, U. S., 1914 Supplement, p. 573.)

Reply of Department of State on arms embargo.—In the correspondence between Senator Stone, Chairman of the Senate Committee on Foreign Relations, and the Secretary of State in January 1915, questions were raised in regard to the attitude of the Government of the United States upon restrictions upon trade in contraband.

On January 8, 1915, Senator Stone writes:

"DEAR MR. SECRETARY: As you are aware, frequent complaints or charges are made in one form or another through the press that this Government has shown partiality to Great Britain, France, and Russia as against Germany and Austria during the present war between those powers; in addition to which I have received numerous letters to the same effect from sympathizers with Germany and Austria. (Foreign Relations, U. S., 1914, Supplement, p. vi.)

Among the other complaints to which Senator Stone calls attention are:

"4. Submission without protest to English violations of the rules regarding absolute and conditional contraband, as laid down—

"(a) In the Hague conventions;

"(b) In international law;

"(c) In the Declaration of London.

"5. Submission without protest to inclusion of copper in the list of absolute contraband.

"6. Submission without protest to interference with American trade to neutral countries—

"(a) In conditional contraband;

"(b) In absolute contraband.

"7. Submission without protest to interruption of trade in conditional contraband consigned to private persons in Germany and Austria, thereby supporting the policy of Great Britain to cut off all supplies from Germany and Austria.

"8. Submission to British interruption of trade in petroleum, rubber, leather, wool, etc.

"9. No interference with the sale to Great Britain and her allies of arms, ammunition, horses, uniforms, and other munitions of war, although such sales prolong the war.

"10. No suppression of sale of dumdum bullets to Great Britain (Ibid., p. vii.)

To these the Secretary of State replied *seriatim* on January 20, 1915.

(4) *Submission without protest to British violations of the rules regarding absolute and conditional contraband as laid down in The Hague conventions, the declaration of London, and international law.*

There is no Hague convention which deals with absolute or conditional contraband, and, as the declaration of London is not in force, the rules of international law only apply. As to the articles to be regarded as contraband, there is no general agreement between nations. It is the practice for a country, either in time of peace or after the outbreak of war, to declare the articles which it will consider as absolute or conditional contraband. It is true that a neutral Government is seriously affected by this declaration, as the rights of its subjects or citizens may be impaired. But the rights and interests of belligerents and neutrals are opposed in respect to contraband articles and trade and there is no tribunal to which questions of difference may be readily submitted.

The record of the United States in the past is not free from criticism. When neutral this Government has stood for a restricted list of absolute and conditional contraband. As a belligerent, we have contended for a liberal list, according to our conception of the necessities of the case.

The United States has made earnest representations to Great Britain in regard to the seizure and detention by the British authorities of all American ships or cargoes bona fide destined to neutral ports on the ground that such seizures and detentions were contrary to the existing rules of international law. It will be recalled, however, that American courts have established various rules bearing on these matters. The rule of "continuous voyage' has been not only asserted by American tribunals but extended by them. They have exercised the right to determine from the circumstances whether the ostensible was the real destination. They have held that the shipment of articles of contraband to a neutral port "to order," from which, as a matter of fact, cargoes had been transshipped to the enemy, is corroborative evidence that the cargo is really destined to the enemy instead of to the neutral port of delivery. It is thus seen that some of the doctrines which appear to bear harshly upon neutrals at the present time are analogous to or outgrowths from policies adopted by the United States when it was a belligerent. The Government therefore can not consistently protest against the application of rules which it has followed in the past, unless they have not been practiced as heretofore.

(5) *Acquiescence without protest to the inclusion of copper and other articles in the British lists of absolute contraband.*

The United States has now under consideration the question of the right of a belligerent to include "copper unwrought" in its list of absolute contraband instead of in its list of conditional contraband. As the Government of the United States has in the past placed "all articles from which ammunition is manufactured" in its contraband list, and has declared copper to be among such materials, it necessarily finds some embarrassment in dealing with the subject.

Moreover, there is no instance of the United States acquiescing in Great Britain's seizure of copper shipments. In every case in which it has been done vigorous representations have been made to the British Government, and the representatives of the United States have pressed for the release of the shipments.

(6 *Submission without protest to interference with American trade to neutral countries in conditional and absolute contraband.*

The fact that the commerce of the United States is interrupted by Great Britain is consequent upon the superiority of her navy on the high seas. History shows that whenever a country has possessed that superiority our trade has been interrupted and that few articles essential to the prosecution of the war have been allowed to reach its enemy from this country. The department's recent note to the British Government, which has been made public, in regard to detentions and seizures of American vessels and cargoes, is a complete answer to this complaint.

Certain other complaints appear aimed at the loss of profit in trade, which must include at least in part trade in contraband with Germany; while other complaints demand the prohibition of trade in contraband, which appear to refer to trade with the allies.

(7) *Submission, without protest to interruption of trade in conditional contraband consigned to private persons in Germany and Austria, thereby supporting the policy of Great Britain to cut off all supplies from Germany and Austria.*

As no American vessel so far as known has attempted to carry conditional contraband to Germany or Austria-Hungary, no ground of complaint has arisen out of the seizure or condemnation by Great Britain of an American vessel with a belligerent destination. Until a case arises and the Government has taken action upon it, criticism is premature and unwarranted. The United States in its note of December 28 to the British Government strongly contended for the principle of freedom of trade in articles of conditional contraband not destined to the belligerent's forces.

(8) *Submission to British interference with trade in petroleum, rubber, leather, wool, etc.*

Petrol and other petroleum products have been proclaimed by Great Britain as contraband of war. In view of the absolute necessity of such products to the use of submarines, aeroplanes, and motors, the United States Government has not yet reached the conclusion that they are improperly included in a list of contraband. Military operations to-day are largely a question of motive power through mechanical devices. It is therefore difficult to argue successfully against the inclusion of petroleum among the articles of contraband. As to the detention of cargoes of petroleum going to neutral countries, this Government has thus far successfully obtained the release in every case of detention or seizure which has been brought to its attention.

Great Britain and France have placed rubber on the absolute contraband list and leather on the conditional contraband list. Rubber is extensively used in the manufacture and operation of motors and, like petrol, is regarded by some authorities as essential to motive power to-day. Leather is even more widely used in cavalry and infantry equipment. It is understood that both rubber and leather, together with wool, have been embargoed by most of the belligerent countries. It will be recalled that the United States has in the past exercised the right of embargo upon exports of any commodity which might aid the enemy's cause.

(9) *The United States has not interfered with the sale to Great Britain and her allies of arms, ammunition, horses, uniforms, and other munitions of war, although such sales prolong the conflict.*

There is no power in the Executive to prevent the sale of ammunition to the belligerents.

The duty of a neutral to restrict trade in munitions of war has never been imposed by international law or by municipal statute. It has never been the policy of this Government to prevent the shipment of arms or ammunition into belligerent territory, except in the case of neighboring American Republics, and then only when civil strife prevailed. Even to this extent the belligerents in the present conflict, when they were neutrals, have never, so far as the records disclose, limited the sale of munitions

of war. It is only necessary to point to the enormous quantities of arms and ammunition furnished by manufacturers in Germany to the belligerents in the Russo-Japanese war and in the recent Balkan wars to establish the general recognition of the propriety of the trade by a neutral nation.

It may be added that on the 15th of December last the German ambassador, by direction of his Government, presented a copy of a memorandum of the Imperial German Government which, among other things, set forth the attitude of that Government toward traffic in contraband of war by citizens of neutral countries. The Imperial Government stated that "under the general principles of international law, no exception can be taken to neutral States letting war material go to Germany's enemies from or through neutral territory," and that the adversaries of Germany in the present war are, in the opinion of the Imperial Government, authorized to "draw on the United States contraband of war and especially arms worth billions of marks." These principles, as the ambassador stated, have been accepted by the United States Government in the statement issued by the Department of State on October 15 last, entitled "Neutrality and trade in contraband." Acting in conformity with the propositions there set forth, the United States has itself taken no part in contraband traffic, and has, so far as possible, lent its influence toward equal treatment for all belligerents in the matter of purchasing arms and ammunition of private persons in the United States.

(10) *The United States has not suppressed the sale of dumdum bullets to Great Britain.*

On December 5 last the German ambassador addressed a note to the department, stating that the British Government had ordered from the Winchester Repeating Arms Co. 20,000 "riot guns," model 1897, and 50,000,000 "buckshot cartridges" for use in such guns. The department replied that it saw a published statement of the Winchester Co., the correctness of which the company has confirmed to the department by telegraph. In this statement the company categorically denies that it has received an order for such guns and cartridges from or made any sales of such material to the British Government, or to any other Government engaged in the present war. The ambassador further called attention to "information, the accuracy of which is not to be doubted," that 8,000,000 cartridges fitted with "mushroom bullets" had been delivered since October of this year by the Union Metallic Cartridge Co. for the armament of the English army. In reply the department referred to the letter of December 10, 1914, of the Remington Arms-Union Metallic Cartridge Co., of New York, to the ambassador, called forth by certain newspaper reports of statements alleged to have been made by the ambassador in regard to the sales by that company of soft-nosed bullets.

From this letter, a copy of which was sent to the department by the company, it appears that instead of 8,000,000 cartridges having been sold, only a little over 117,000 were manufactured and 109,000 were sold. The letter further asserts that these cartridges

were made to supply a demand for a better sporting cartridge with a soft-nosed bullet than had been manufactured theretofore, and that such cartridges can not be used in the military rifles of any foreign powers. The company adds that its statements can be substantiated and that it is ready to give the ambassador any evidence that he may require on these points. The department further stated that it was also in receipt from the company of a complete detailed list of the persons to whom these cartridges were sold, and that from this list it appeared that the cartridges were sold to firms in lots of 20 to 2,000 and one lot each of 3,000, 4,000, and 5,000. Of these only 960 cartridges went to British North America and 100 to British East Africa.

The department added that, if the ambassador could furnish, evidence that this or any other company is manufacturing and selling for the use of the contending armies in Europe cartridges whose use would contravene The Hague conventions, the department would be glad to be furnished with this evidence, and that the President would, in case any American company is shown to be engaged in this traffic, use his influence to prevent, so far as possible, sales of such ammunition to the powers engaged in the European war, without regard to whether it is the duty of this Government, upon legal or conventional grounds, to take such action.

The substance of both the ambassador's note and the department's reply have appeared in the press.

The department has received no other complaints of alleged sales of dumdum bullets by American citizens to belligerent Governments. (Ibid., p. ix.)

Restrictions on clearance.—There were attempts to use the ports and waters of the United States as bases, and Congress took cognizance of this by adopting a Joint Resolution:

"*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That, from and after the passage of this resolution, and during the existence of a war to which the United States is not a party, and in order to prevent the neutrality of the United States from being violated by the use of its territory, its ports, or its territorial waters as the base of operations for the armed forces of a belligerent, contrary to the obligations imposed by the law of nations, the treaties to which the United States is a party, or contrary to the statutes of the United States, the President be, and he is hereby, authorized and empowered to direct the collectors of customs under the jurisdiction of the United States to withhold clearance from any vessel, American or foreign, which he has reasonable cause to believe to be about to carry fuel, arms, ammunition, men, or supplies to any warship, or tender, or supply ship of a belligerent nation, in violation of the obligations of the United States as a neutral nation.

In case any such vessel shall depart or attempt to depart from the jurisdiction of the United States without clearance for any of the purposes above set forth, the owner or master or person or persons having charge or command of such vessel shall severally be liable to a fine of not less than $2,000 nor more than $10,000, or to imprisonment not to exceed two years, or both, and, in addition, such vessel shall be forfeited to the United States.

That the President of the United States be, and he is hereby, authorized and empowered to employ such part of the land or naval forces of the United States as shall be necessary to carry out the purposes of this resolution.

That the provisions of this resolution shall be deemed to extend to all land and water, continental or insular, within the jurisdiction of the United States.

Approved, March 4, 1915."

(38 Stat. 1226.)

German attitude on trade in arms, 1915.—On April 4, 1915, the German Ambassador delivered to the American Secretary of State a memorandum on German-American trade and the question of delivery of arms. He refers to the British Orders-in-Council as "one-sidedly" modifying the principles of international law and leading to unlawful interference with American commerce. He then says:

"Then there is also the attitude of the United States in the question of the exportation of arms. The Imperial Government feels sure that the United States Government will agree that in questions of neutrality it is necessary to take into consideration not only the formal aspect of the case, but also the spirit to which the neutrality is carried out.

"The situation in the present war differs from that of any previous war. Therefore any reference to arms furnished by Germany in former wars is not justified, for then it was not a question *whether* war material should be supplied to the belligerents, but *who* should supply it in competition with other nations. In the present war all nations having a war material industry worth mentioning are either involved in the war themselves or are engaged in perfecting their own armaments, and have therefore laid an embargo against the exportation of war material. The United States is accordingly the only neutral country in a position to furnish war materials. The conception of neutrality is thereby given a new purport, independently of the formal question of hitherto existing law. In contradiction thereto, the United States is building up a powerful arms industry in the broadest sense, the existing plants not only being worked but enlarged by all available means, and new ones built. The international conventions for the protection of the rights of neutral nations doubtless sprang from the necessity of protect-

ing the existing industries of neutral nations as far as possible from injury to their business. But it can in no event be in accordance with the spirit of true neutrality if, under the protection of such international stipulations, an entirely new industry is created in a neutral state, such as is the development of the arms industry in the United States, the business whereof, under the present conditions, can benefit only the belligerent powers.

"This industry is actually delivering goods only to the enemies of Germany. The theoretical willingness to supply Germany also, if shipments thither were possible, does not alter the case. If it is the will of the American people that there shall be a true neutrality, the United States will find means of preventing this one-sided supply of arms or at least of utilizing it to protect legitimate trade with Germany, especially that in foodstuffs." (Foreign Relations, U. S. 1915, Supplement, p. 159.)

Attitude of United States, August 1915.—In a long note to be presented by the American Ambassador in Austria-Hungary to the Foreign Office, the Secretary of State expressed surprise that it could be thought that changing conditions during a war could affect neutral traffic in arms and ammunition or that neutrality implied an obligation to equalize trade opportunities. The Secretary of State maintained that to close American markets to either belligerent would be contrary to the principles for which the United States had stood.

The American Secretary of State further said:

"But, in addition to the question of principle, there is a practical and substantial reason why the Government of the United States has from the foundation of the Republic to the present time advocated and practiced unrestricted trade in arms and military supplies. It has never been the policy of this country to maintain in time of peace a large military establishment or stores of arms and ammunition sufficient to repel invasion by a well-equipped and powerful enemy. It has desired to remain at peace with all nations and to avoid any appearance of menacing such peace by the threat of its armies and navies. In consequence of this standing policy the United States would, in the event of attack by a foreign power, be at the outset of the war seriously, if not fatally, embarrassed by the lack of arms and ammunition and by the means to produce them in sufficient quantities to supply the requirements of national defense. The United States has always depended upon the right and power to purchase arms and ammunition from neutral nations in case of foreign attack. The right, which it claims for itself, it cannot deny to others.

"A nation whose principle and policy it is to rely upon international obligations and international justice to preserve its political and territorial integrity, might become the prey of an aggressive nation whose policy and practice it is to increase its military strength during times of peace with the design of conquest, unless the nation attacked can, after war had been declared, go into the markets of the world and purchase the means to defend itself against the aggressor.

"The general adoption by the nations of the world of the theory that neutral powers ought to prohibit the sale of arms and ammunition to belligerents would compel every nation to have in readiness at all times sufficient munitions of war to meet any emergency which might arise and to errect and maintain establishments for the manufacture of arms and ammunitions sufficient to supply the needs of its military and naval forces throughout the progress of a war. Manifestly the application of this theory would result in every nation becoming an armed camp, ready to resist aggression and tempted to employ force in asserting its rights rather than appeal to reason and justice for the settlement of international disputes.

"Perceiving, as it does, that the adoption of the principle that it is the duty of a neutral to prohibit the sale of arms and ammunition to a belligerent during the progress of a war would inevitably give the advantage to the belligerent which had encouraged the manufacture of munitions in time of peace and which had laid in vast stores of arms and ammunition in anticipation of war, the Government of the United States is convinced that the adoption of the theory would force militarism on the world and work against that universal peace which is the desire and purpose of all nations which exalt justice and righteousness in their relations with one another." (Foreign Relations, U. S., 1915 Supplement, p. 796.)

Embargoes on arms in 1915.—On August 30, 1915, the Secretary of State by a circular telegram to American diplomatic officers in European neutral countries made inquiry in regard to embargoes.

"Please discreetly ascertain and telegraph whether the country to which you are accredited has embargoed arms and ammunition during the present war in order to conserve them for home use, or not to incur enmity of belligerents, or to maintain neutrality, and whether the sale of arms and ammunition would have been more than a negligible factor in supplying the belligerents. (*Ibid.*, p. 801.)

LANSING."

The replies showed that embargoes on arms are often imposed for domestic reasons. Minister Van Dyke reported September 4, 1915, that the "Netherlands had

embargoed all munitions to retain them for home use." (Ibid., p. 803.) This was a common reason given, though occasionally "to avoid enmity" was given also.

Portugal had not embargoed arms, nor had Spain, though Spain's policy was "to maintain absolute neutrality and conserve supplies." Italy recognized that sale was lawful under the Hague Convention.

Up to September 16, 1915, it appeared that none of the South American states except Brazil had embargoed arms and ammunition.

China prohibited private commerce in contraband.

Attitude on munitions sale, 1916.—Numerous complaints were made to the Department of State in regard to the failure of the Government to restrict or forbid exports of munitions. It was pointed out to the Department of State that the geographical relations of the belligerents in Europe tended to make the transit of arms from the United States more easy to the Allied than to the Central Powers. It was intimated that to permit freedom of trade in munitions, etc., would under these conditions be unneutral. The Counselor of the Department of State, Mr. Polk, on August 18, 1916, said of this matter:

"If any American citizens, partizans of Germany and Austria-Hungary, feel that this administration is acting in a way injurious to the cause of those countries, this feeling results from the fact that on the high seas the German and Austro-Hungarian naval power has from the commencement of the present war been inferior to the British. It is the business of a belligerent operating on the high seas, not the duty of a neutral, to prevent all trade in contraband from reaching an enemy. Those in this country who sympathize with Germany and Austria-Hungary appear to assume that some obligation rests upon this Government in the performance of its neutral duty to prevent all trade in contraband, and thus to equalize the difference due to the relative naval strength of the belligerents. No such obligation exists. It would be an unneutral act on the part of this Government to adopt such a policy if the Executive had the power to do so. If Germany and Austria-Hungary cannot import contraband from this country, it is not, because of that fact, the duty of the

United States to close its markets to the Allies. The markets of this country are open upon equal terms to all the world, to every nation, belligerent or neutral.

"There is no power in the Executive to prevent the sales of munitions of war to the belligerents. The duty of a neutral to restrict trade in munitions of war has never been imposed by international law or municipal statute. It has never been the policy of this Government to prevent the shipment of arms or ammunition into belligerent territory, except in the case of neighboring American republics, and then only when civil strife prevailed. Even to this extent the belligerents in the present conflict, when they were neutrals, have never, so far as the records disclose, limited the sale of munitions of war. It is only necessary to point to the enormous quantities of arms and ammunitions furnished by manufacturers in Germany to the belligerents in the Russo-Japanese war and the recent Balkan wars to establish the general recognition of the propriety of the trade by a neutral nation.

"It may be added that on the 15th of December, 1914, the German Ambassador, by direction of his Government, presented a copy of a memorandum of the Imperial German Government which, among other things, set forth the attitude of that Government toward traffic in contraband of war by citizens of neutral countries. The Imperial Government stated that 'under the general principles of international law, no exception can be taken to neutral states letting war material go to Germany's enemies from or through neutral territory.'" (Foreign Relations, U. S., 1916 Supplement, p. 9.)

Act of Congress, June 15, 1917.—The Act of Congress of March 14, 1912, was elaborated in later acts as in that of June 15, 1917, which, under conditions of war, provided for a general enforcement:

"Whenever an attempt is made to export or ship from or take out of the United States, any arms or munitions of war, or other articles, in violation of law, or whenever there shall be known or probable cause to believe that any such arms or munitions of war, or other articles, are being or are intended to be exported, or shipped from, or taken out of the United States, in violation of law, the several collectors, naval officers, surveyors, inspectors of customs, and marshals, and deputy marshals of the United States, and every other person duly authorized for the purpose by the President, may seize and detain any articles or munitions of war about to be exported or shipped from, or taken out of the United States, in violation of law, and the vessels or vehicles containing the same, and retain possession thereof until released or disposed of as hereinafter directed. If upon due inquiry as hereinafter provided, the property seized shall appear to have been about to be so unlawfully exported, shipped from, or taken out of the United States, the same shall be forfeited to the United States." (40 Stat. 223.)

In this Act naval officers are specifically authorized to see that the law is observed.

Presidents have from time to time proclaimed that conditions demand the enforcements of these acts.

Brussels protocol, 1908.—On July 22, 1908, and referring to the General Act of the Conference of Brussels of July 2, 1890, a protocol restricting the export of war materials to certain African areas was concluded. The parties to the protocol were Great Britain, the Congo Free-State, France, Germany, Portugal, and Spain.

The protocol provided:

"L'importation de toute espèce d'armes à feu, de munitions, et de poudre destinées à des indigènes ainsi que la vente et la délivrance de toute espèce d'armes à feu, de munitions et de poudre à des indigènes seront suspendues pour la durée de quatre ans à partir du 15 fevrier, 1909, dans la zone designée au § 2, ces dispositions n'étant pas applicables aux armes, munitions et poudres importées en transit et destinées à des regions en dehors de ladite zone. Il est entendu que les autorités locales pourront dans des cas tout à fait exceptionnels delivrer aux indigènes des armes à feu, des munitions et de la poudre." (British and Foreign States Papers, vol. 101, p. 176.)

Convention of St. Germain-en-Laye, 1919.—In the preamble of the Convention of St. Germain-en-Laye, September 10, 1919, it was stated that the provision of the Brussels Act of July 2, 1890, and of other conventions "no longer meet present conditions" in regard to trade in arms and ammunition and that special provisions should be agreed upon for certain areas, particularly in Africa and Asia.

This Convention with the Revision of the Act of Berlin, signed at the same time, aimed to prohibit the export of arms, etc., and to supervise the import of arms, etc., in certain areas of Africa and Asia. The plenipotentiaries of the United States signed the Convention of St. Germain-en-Laye, but it was not ratified by the United States till 1934 (49 Stat. 3027), and was not ratified by some of the larger European states.

Article I of this Convention was as follows:

"The High Contracting Parties undertake to prohibit the export of the following arms of war: artillery of all kinds, apparatus for the discharge of all kinds of projectiles explosive or gas-diffusing, flame-throwers, bombs, grenades, machine-guns and rifled small-bore breech-loading weapons of all kinds, as well as the exportation of the ammunition for use with such arms. The prohibition of exportation shall apply to all such arms and ammunition, whether complete or in parts.

"Nevertheless, notwithstanding this prohibition, the High Contracting Parties reserve the right to grant, in respect of arms whose use is not prohibited by International Law, export licenses to meet the requirements of their Governments or those of the Government of any of the High Contracting Parties, but for no other purpose.

"In the case of firearms and ammunition adapted both to warlike and also to other purposes, the High Contracting Parties reserve to themselves the right to determine from the size, destination, and other circumstances of each shipment for what uses it is intended and to decide in each case whether the provisions of this Article are applicable to it."

Restriction on importation of arms and munitions, 1919.—A collective agreement in regard to the importation of arms and munitions in case of the domestic disturbances in China in 1919 was found possible. This was embodied in a note of May 5, 1919, from the Dean of the Diplomatic Corps to the Chinese Acting Minister of Foreign Affairs. The specific part of the agreement follows:

"The Governments of Great Britain, Spain, Portugal, the United States, Russia, Brazil, France and Japan have agreed effectively to restrain their subjects and citizens from exporting to or importing into China arms and munitions of war and material destined exclusively for their manufacture until the establishment of a government whose authority is recognized throughout the whole country and also to prohibit during the above period the delivery of arms and munitions for which contracts have already been made but not executed.

"The Representatives of the Netherlands, Denmark, Belgium and Italy are also in full accord with the above policy, but await the instructions of their respective Government before announcing the adhesion of the latter.

"The Foreign Representatives desire to express the earnest hope that the Chinese Government in keeping with this policy will on their part agree to suspend the issue of permits to import military arms, ammunition and munitions of war and will direct the Customs that the introduction of such articles is absolutely prohibited.

I avail myself, etc.

J. N. JORDAN.

(Foreign Relations, U. S. 1919, vol. I, p. 670.)

Later, September 10, 1919, the United States interpreted the agreement "as including raw material for manufacture of arms and ammunition and has only recently held it to include the machinery used in their manufacture." (Ibid., p. 672.)

Some Governments were not in accord with this interpretation.

Mandates and traffic in arms.—The mandate system introduced by the Treaty of Versailles, 1919, generally provided for the control of the traffic in arms. The document entrusting the mandated area to a mandatory usually contained a specific provision in regard to traffic in arms and referred to the Convention of September 10, 1919:

"The mandatory shall also see that the traffic in arms and ammunition is controlled in accordance with principles analogous to those laid down in the convention relating to the control of the arms traffic signed on September 10, 1919, or in any convention amending the same." (Naval War College, International Law Situations, 1929, p. 50.)

Convention of Geneva, June 17, 1925.—The Convention on Supervision of International Trade in Arms and Ammunition and in Implements of War, Geneva, June 17, 1925, was drawn up with view to introducing "a general and effective system of supervision and publicity" and special supervision for certain areas. In many respects it was more detailed than the Convention of St. Germain-en-Laye of 1919. It enumerated five categories of arms, ammunition, and implements and gave specifications under each category.

The categories were as follows:

"Category I. Arms, ammunition and implements of war exclusively designed and intended for land, sea or aerial warfare.

"Category II. Arms and ammunition capable of use both for military and other purposes.

"Category III. Vessels of war and their armament.

"Category IV. 1. Aircraft, assembled or dismantled. 2. Aircraft engines.

"Category V. 1. Gunpowder and explosives, except common black gunpowder. 2. Arms and ammunition other than those

covered by Categories I and II, such as pistols and revolvers of all models, rifled weapons with a 'break-down' action, other rifled fire-arms of a calibre of less than 6 mm. designed for firing from the shoulder, smooth-bore shot-guns, guns with more than one barrel of which at least one barrel is smooth-bore, fire-arms firing rimfire ammunition, muzzle-loading fire-arms." (League of Nations Document, A–16.1925.IX.)

The provisions for publicity were detailed and special zones were placed under a defined regime. A large number of states signed this convention and Italy and Ethiopia were included. Ratification has not been general, and in case of some of the larger states has been conditional.

The United States and Chaco Arms Embargo, 1934.— A joint resolution of Congress, May 28, 1934, placed restrictions upon the sale of arms and munitions of war in the United States. The resolution was as follows:

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That if the President finds the prohibition of sale of arms and munitions of war in the United States to those countries now engaged in armed conflict in the Chaco may contribute to the re-establishment of peace between those countries, and if after consultation with the governments of other American republics and with their cooperation, as well as that of such other governments as he may deem necessary, he makes proclamation to that effect, it shall be unlawful to sell, except under such limitations and exceptions as the President prescribes, any arms or munitions of war in any place in the United States to the countries now engaged in that armed conflict, or to any person, company or association acting in the interest of either country, until otherwise ordered by the President or by Congress.

"Sec. 2. Whoever sells any arms or munitions of war in violation of Section 1 shall, on conviction, be punished by a fine not exceeding $10,000 or by imprisonment not exceeding two years, or both." (48 Stat. 811.)

The President accordingly issued a proclamation:

"Now, therefore, I, Franklin D. Roosevelt, President of the United States of America, acting under and by virtue of the authority conferred on me by the said joint resolution of Congress, do hereby declare and proclaim that I have found that the prohibition of the sale of arms and munitions of war in the United States to those countries now engaged in armed conflict in the Chaco may contribute to the re-establishment of peace between those countries, and that I have consulted with the governments of other American republics and have been

assured of the cooperation of such governments as I have deemed necessary as contemplated by the said joint resolution; and I do hereby admonish all citizens of the United States and every person to abstain from every violation of the provisions of the joint resolution above set forth, hereby made applicable to Bolivia and Paraguay, and I do hereby warn them that all violations of such provisions will be rigorously prosecuted.

"And I do hereby enjoin upon all officers of the United States charged with the execution of the laws thereof, the utmost diligence in preventing violations of the said joint resolution and this my proclamation issued thereunder, and in bringing to trial and punishment any offenders against the same.

"And I do hereby delegate to the Secretary of State the power of prescribing exceptions and limitations to the application of the said joint resolution of May 28, 1934, as made effective by this my proclamation issued thereunder." (48 Stat. 1744.)

This proclamation was revoked as to the sale of arms and munitions of war to Bolivia and Paraguay on November 14, 1935—effective from November 29, 1935.

In rendering the opinion in the case of the *United States* v. *Curtis-Wright Export Corporation et al.*, December 21, 1936, the Supreme Court said of the constitutionality of the joint resolution that,

"It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the Federal Government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.

"It is quite apparent that if, in the maintenance of our international relations, embarrassment—perhaps serious embarrassments—is to be avoided and success for our aims achieved, Congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.

"Moreover, he, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war. He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials."

"*At their own risk.*"—In general to a question at the press conference on October 10, 1935, Secretary of State

Hull said of American interests trading with belligerents " at their own risk":

"As I said to you gentlemen before, the language of the President's statement has thoroughly well-defined meaning, and every person should be able to grasp its meaning and its implications. Technically, of course, there is no legal prohibition—apart from the proclamation governing the export of arms—against our people entering into transactions with the belligerents or either of them. The warning given by the President in his proclamation concerning travel on belligerent ships and his general warning that during the war any of our people who voluntarily engage in transactions of any character with either of the belligerents do so at their own risk were based upon the policy and purpose of keeping this country out of war—keeping it from being drawn into war. It certainly was not intended to encourage transactions with the belligerents.

"Our people might well realize that the universal state of business uncertainty and suspense on account of the war is seriously handicapping business between all countries, and that the sooner the war is terminated the sooner the restoration and stabilization of business in all parts of the world, which is infinitely more important than trade with the belligerents, will be brought about.

"This speedy restoration of more full and stable trade conditions and relationships among the nations is by far the most profitable objective for our people to visualize, in contrast with such risky and temporary trade as they might maintain with belligerent nations.

"I repeat that our objective is to keep this country out of war." (Department of State, Press Releases, Vol. XIII, p. 303.)

The Secretary of State made further explanations on November 15, 1935:

"On October 10 I explained that the President's statement was based primarily upon the policy and purpose of keeping this country out of war, and that 'it certainly was not intended to encourage transactions with the belligerents.' I further explained that 'our people might well realize that the universal state of business uncertainty and suspense on account of the war is seriously handicapping business between all countries, and that the sooner the war is terminated the sooner the restoration and stabilization of business in all parts of the world, which is infinitely more important than trade with the belligerents, will be brought about.' The President, in a statement on October 20, further emphasized the spirit of this policy."

"The American people are entitled to know that there are certain commodities such as oil, copper, trucks, tractors, scrap iron, and scrap steel which are essential war materials, although not actually 'arms, ammunition, or implements of war', and that according to recent Government trade reports a considerably increased amount of these is being exported for war purposes.

This class of trade is directly contrary to the policy of this Government as announced in official statements of the President and Secretary of State, as it is also contrary to the general spirit of the recent neutrality act.

"The administration is closely observing the trend and volume of exports to those countries, and within a few days the Department of Commerce expects to have complete detailed lists of all commodities exported to the belligerents which will enable exact comparison with lists for the same period last year." (Ibid., p. 382.)

Proclamation of the United States, 29 February 1936.—The attitude of the United States in regard to the export and transportation of arms, ammunition, and implements of war is stated in the proclamation of 29 February 1936:

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

Whereas section 1 of a joint resolution of Congress, entitled "Joint resolution providing for the prohibition of the export of arms, ammunition, and implements of war to belligerent countries; the prohibition of the transportation of arms, ammunition, and implements of war by vessels of the United States for the use of belligerent states; for the registration and licensing of persons engaged in the business of manufacturing, exporting, or importing arms, ammunition, or implements of war; and restricting travel by American citizens on belligerent ships during war", approved August 31, 1935, provides as follows:

"*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled*, That upon the outbreak or during the progress of war between, or among, two or more foreign states, the President shall proclaim such fact, and it shall thereafter be unlawful to export arms, ammunition, or implements of war from any place in the United States, or possessions of the United States, to any port of such belligerent states, or to any neutral port for transshipment to, or for the use of, a belligerent country.

"The President, by proclamation, shall definitely enumerate the arms, ammunition, or implements of war, the export of which is prohibited by this Act.

"The President may, from time to time, by proclamation, extend such embargo upon the export of arms, ammunition, or implements of war to other states as and when they may become involved in such war.

"Whoever, in violation of any of the provisions of this section, shall export, or attempt to export, or cause to be exported, arms, ammunition, or implements of war from the United States, or any of its possessions, shall be fined not more than $10,000 or imprisoned not more than five years, or both, and the property, vessel, or vehicle containing the same shall be subject to the provisions

of sections 1 to 8, inclusive, title 6, chapter 30, of the Act approved June 15, 1917 (40 Stat. 223–225; U. S. C., title 22, secs. 238–245).

"In the case of the forfeiture of any arms, ammunition, or implements of war by reason of a violation of this Act, no public or private sale shall be required; but such arms, ammunition, or implements of war shall be delivered to the Secretary of War for such use or disposal thereof as shall be approved by the President of the United States.

"When in the judgment of the President the conditions which have caused him to issue his proclamation have ceased to exist he shall revoke the same and the provisions hereof shall thereupon cease to apply.

"Except with respect to prosecutions committed or forfeitures incurred prior to March 1, 1936, this section and all proclamations issued thereunder shall not be effective after February 29, 1936."

And whereas section 1 of a joint resolution of Congress extending and amending the joint resolution approved August 31, 1935, which was approved February 29, 1936, provides as follows:

"*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled*, That section 1 of the joint resolution (Public Resolution Numbered 67, Seventy-fourth Congress) approved August 31, 1935, be, and the same hereby is, amended by striking out in the first section, on the second line, after the word 'assembled' the following words: 'That upon the outbreak or during the progress of war between', and inserting therefor the words: 'Whenever the President shall find that there exists a state of war between'; and by striking out the word 'may' after the word 'President' and before the word 'from' in the twelfth line, and inserting in lieu thereof the word 'shall'; and by substituting for the last paragraph of said section the following paragraph: 'except with respect to offenses committed, or forfeitures incurred prior to May 1, 1937, this section and all proclamations issued thereunder shall not be effective after May 1, 1937.'"

And whereas my proclamation of October 5, 1935, issued pursuant to section 1 of the joint resolution approved August 31, 1935, declared that a state of war unhappily existed between Ethiopia and the Kingdom of Italy.

Now, therefore, I, Franklin D. Roosevelt, President of the United States of America, acting under and by virtue of the authority conferred on me by the said joint resolution as amended by the joint resolution of Congress approved February 29, 1936, do hereby proclaim that a state of war unhappily continues to exist between Ethiopia and the Kingdom of Italy; and I do hereby admonish all citizens of the United States or any of its possessions and all persons residing or being within the territory or jurisdiction of the United States or its possessions to abstain from every violation of the provisions of the joint resolution above set forth, hereby made effective and applicable to the export of arms, ammunition, or implements of war from any place in the United States or its possessions to Ethiopia or to the Kingdom of Italy, or to any Italian possession, or to any neutral port for transshipment to, or for the use of, Ethiopia or the Kingdom of Italy.

And I do hereby declare and proclaim that the articles listed below shall be considered arms, ammunition, and implements of war for the purposes of section 1 of the said joint resolution of Congress:

Category I

(1) Rifles and carbines using ammunition in excess of caliber .22, and barrels for those weapons;

(2) Machine guns, automatic or autoloading rifles, and machine pistols using ammunition in excess of caliber .22, and barrels for those weapons;

(3) Guns, howitzers, and mortars of all calibers, their mountings and barrels;

(4) Ammunition in excess of caliber .22 for the arms enumerated under (1) and (2) above, and cartridge cases or bullets for such ammunition; filled and unfilled projectiles or forgings for such projectiles for the arms enumerated under (3) above; propellants with a web thickness of .015 inch or greater for the projectiles of the arms enumerated under (3) above;

(5) Grenades, bombs, torpedoes and mines, filled or unfilled, and apparatus for their use or discharge;

(6) Tanks, military armored vehicles, and armored trains.

Category II

Vessels of war of all kinds, including aircraft carriers and submarines.

Category III

(1) Aircraft, assembled or dismantled, both heavier and lighter than air, which are designed, adapted, and intended for aerial combat by the use of machine guns or of artillery or for the carrying and dropping of bombs, or which are equipped with, or which by reason of design or construction are prepared for, any of the appliances referred to in paragraph (2) below;

(2) Aerial gun mounts and frames, bomb racks, torpedo carriers, and bomb or torpedo release mechanisms.

Category IV

(1) Revolvers and automatic pistols using ammunition in excess of caliber .22;

(2) Ammunition in excess of caliber .22 for the arms enumerated under (1) above, and cartridge cases or bullets for such ammunition.

Category V

(1) Aircraft, assembled or dismantled, both heavier and lighter than air, other than those included in Category III;

(2) Propellers or air screws, fuselages, hulls, wings, tail units, and under-carriage units;

(3) Aircraft engines, assembled or unassembled.

Category VI

(1) Livens projectors and flame throwers;

(2) Mustard gas (dichlorethylsulphide), lewisite (chlorovinyldichlorarsine and dichlorodivinylchlorarsine), ethyldichlor-

arsine, methyldichorarsine, ethyliodoacetate, brombenzylcyanide, diphenolchlorarsine, and dyphenolcyanoarsine.

And I do hereby enjoin upon all officers of the United States, charged with the execution of the laws thereof, the utmost diligence in preventing violations of the said joint resolution, and this my proclamation issued thereunder, and in bringing to trial and punishment any offenders against the same.

And I do hereby delegate to the Secretary of State the power of prescribing regulations for the enforcement of section 1 of the said joint resolution of August 31, 1935, as amended by section 1 of the joint resolution of Congress approved February 29, 1936, and as made effective by this my proclamation issued thereunder.

And I do hereby revoke my proclamation of October 5, 1935, concerning the export of arms, ammunition, and implements of war to Ethiopia and Italy, which was issued pursuant to the terms of section 1 of the joint resolution of Congress approved August 31, 1935, provided, however, that this action shall not have the effect of releasing or extinguishing any penalty, forfeiture or liability incurred under the aforesaid proclamation of October 5, 1935; and that the said proclamation shall be treated as remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the Seal of the United States of America to be affixed.

DONE at the city of Washington this 29 day of February, in the year of our Lord nineteen hundred and thirty-six, and of the Independence of the United States of America the one hundred and sixtieth.

[SEAL]

FRANKLIN D ROOSEVELT

By the President:
CORDELL HULL
Secretary of State.

Department of State's position, 1935.—On November 10, 1935, an address of the Secretary of State Hull set forth his point of view upon the embargo on arms, saying:

"Any discussion of the avoidance of war, or of the observance of neutrality in the event of war, would be wholly incomplete if too much stress were laid on the part played in the one or the other by the shipment, or the embargoing of the shipment, of arms, ammunition, and implements of war. The shipment of arms is not the only way and, in fact, is not the principal way by which our commerce with foreign nations may lead to serious international difficulties. To assume that by placing an embargo on arms we are making ourselves secure from dangers of conflict with belligerent countries is to close our eyes to

manifold dangers in other directions. The imposition of an arms embargo is not a complete panacea, and we cannot assume that when provision has been made to stop the shipment of arms, which as absolute contraband have always been regarded as subject to seizure by a belligerent, we may complacently sit back with the feeling that we are secure from all danger. Attempts by a belligerent to exercise jurisdiction on the high seas over trade with its enemy, or with other neutral countries on the theory that the latter are supplying the enemy, may give rise to difficulties no less serious than those resulting from the exportation of arms and implements of war. So also transactions of any kind between American nationals and a belligerent may conceivably lead to difficulties of one kind or another between the United States and the belligerent. It was with these thoughts in mind that the President issued his timely warning that citizens of the United States who engage in transactions of any character with either belligerent would do so at their own risk. * * *

"Our own interest and our duty as a great power forbid that we shall sit idly by and watch the development of hostilities with a feeling of self-sufficiency and complacency when by the use of our influence, short of becoming involved in the dispute itself, we might prevent or lessen the scourge of war. In short, our policy as a member of the community of nations should be two-fold: first, to avoid being brought into a war, and second, to promote as far as possible the interests of international peace and good will. A virile policy tempered with prudent caution is necessary if we are to retain the respect of other nations and at the same time hold our position of influence for peace and international stability in the family of nations." (Department of State, Press Releases, Vol. XIII, p. 367.)

Travel in time of war.—Experience during the World War, 1914–1918, furnished examples of problems arising in consequence of the presence of neutral nationals upon belligerent vessels:

The Joint Resolution of August 31, 1935, provided:

SEC. 6. Whenever, during any war in which the United States is neutral, the President shall find that the maintenance of peace between the United States and foreign nations, or the protection of the lives of citizens of the United States, or the protection of the commercial interests of the United States and its citizens, or the security of the United States requires that the American citizens should refrain from traveling as passengers on the vessels of any belligerent nation, he shall so proclaim, and thereafter no citizen of the United States shall travel on any vessel of any belligerent nation except at his own risk, unless in accordance with such rules and regulations as the President shall prescribe: *Provided, however*, That the provisions of this section shall not apply to a citizen traveling on the vessel of a belligerent whose voyage was begun in advance

of the date of the President's proclamation, and who had no opportunity to discontinue his voyage after that date: *And provided further,* That they shall not apply under ninety days after the date of the President's proclamation to a citizen returning from a foreign country to the United States or to any of its possessions. When, in the President's judgment, the conditions which have caused him to issue his proclamation have ceased to exist, he shall revoke his proclamation and the provisions of this section shall thereupon cease to apply. (49 Stat. (Pt. I), 1084.)

Reply of the Department of State on loans.—In the letter of January 8, 1915, from Senator Stone, the Chairman of the Senate Committee on Foreign Relations to the Secretary of State reference was made to a complaint regarding:

"(13) *Change of policy in regard to loans to belligerents.*
"(a) General loans;
"(b) Credit loans."

In discussing this complaint, the Secretary of State said:

"(13) *Change of policy in regard to loans to beligerents.*

"War loans in this country were disapproved because inconsistent with the spirit of neutrality. There is a clearly defined difference between a war loan and the purchase of arms and ammunition. *The policy of disapproving of war loans affects all governments alike, so that the disapproval is not an unneutral act.* The case is entirely different in the matter of arms and ammunition, because prohibition of export not only might not, but in this case would not, operate equally upon the nations at war. Then, too, the reason given for the disapproval of war loans is supported by other considerations which are absent in the case presented by the sale of arms and ammunition. The taking of money out of the United States during such a war as this might seriously embarrass the Government in case it needed to borrow money and it might also seriously impair this Nation's ability to assist the neutral nations which, though not participants in the war, are compelled to bear a heavy burden on account of the war. and, again, a war loan, if offered for popular subscription in the United States, would be taken up chiefly by those who are in sympathy with the belligerent seeking the loan. The result would be that great numbers of American people might become more earnest partisans, having material interest in the success of the belligerent whose bonds they hold. These purchases would not be confined to a few, but would spread generally throughout the country, so that the people would be divided into groups of partisans, which would result in intense bitterness and might cause an undesirable, if not a serious, situation. On the other hand, contracts for and sales of contraband are mere matters of trade. The manufacturer, unless peculiarly senti-

mental, would sell to one belligerent as readily as he would to another. No general spirit of partisanship is aroused—no sympathies excited. The whole transaction is merely a matter of business.

"This Government has not been advised that any general loans have been made by foreign governments in this country since the President expressed the wish that loans of this character should not be made." (Foreign Relations, U. S. 1914 Supplement, p. xii.)

The Secretary of State had early in the World War sent the following telegram to J. P. Morgan and Company.

"DEPARTMENT OF STATE
Washington, August 15, 1914.

"Inquiry having been made as to the attitude of this Government in case American bankers are asked to make loans to foreign governments during the war in Europe, the following announcement is made:

" 'There is no reason why loans should not be made to the governments of neutral nations, but in the judgment of this Government, loans by American bankers to any foreign nation which is at war are inconsistent with the true spirit of neutrality.'

W. J. BRYAN."

(Ibid., p. 580.)

The Government of the United States was obliged to take facts into consideration. "The true spirit of neutrality" which Mr. Bryan had indicated on August 15, 1914, as inconsistent with negotiating of loans by American bankers to belligerents was not supported by any law. Law usually rests upon long experience. As was evident in the press notice of March 31, 1915, the Government had not found itself justified in "interposing objection" and gradually nearly all restraints were removed. Some may say that the economic motive was more potent than the moral or some other motive, but in matters of this kind, it is essential to recall that the state is a political organization and its action must ultimately rest upon the forces conceived to be working for the public well-being and these are many and varied.

Statement on loans in 1916.—Queries were raised in regard to loans to belligerents in 1916 also. On this

subject, Mr. Polk, then Counselor for the Department of State, said:

"War loans in this country were disapproved because deemed inconsistent with the spirit of neutrality. At the very beginning of the present war this Government announced that in its judgment loans by American bankers to any foreign nation which is at war is inconsistent with the true spirit of neutrality and refused in any way to facilitate such loans.

"While expressing its position with regard to these loans, there was no way in which the Government could prevent private loans being made to the belligerents since such loans were in violation of no law of the United States and there was no way in which those making the loans could be prosecuted. The Government has in no way facilitated or encouraged any loans that may have been made.

"The State Department has from time to time received information, directly or indirectly, to the effect that belligerent nations had arranged with banks in the United States for credits for various sums. While loans to belligerents have been disapproved, this Government has not felt that it was justified in interposing objection to the credit arrangements which have been brought to its attention. It has neither approved these credits nor disapproved. It has simply taken no action in the premises and expressed on opinion." (Foreign Relations, 1916, Supplement, p. 8.)

Limitation of loans proposal, 1917.—The problem of loans in various forms became more and more serious as the war progressed. The attempts to close the avenues of credit were only in part successful. In a letter of August 18, 1917, to the Secretary of State the British Embassy outlined in detail a plan to which he hoped the United States would adhere. In this letter he says:

"It is a matter of the gravest concern to His Majesty's Government, at the present time, that supplies of monetary credit—one of the most vital forms of all aids—continue to reach the enemy through neutral countries, as it cannot be doubted that aid in this form must prolong the war, and so be the direct cause of further loss of life and unnecessary suffering.

"As you are well aware, the enemy has only four possible methods by which he can pay for the supplies of goods and other aids which he obtains from neutral countries. These are (a) to export goods or services; (b) to export gold; (c) to obtain credits from neutrals; (d) to realise his existing investments in neutral countries.

"It is obvious that if it is possible to prevent the enemy obtaining credit from neutrals or realising his investments through them, he will be driven, either to export more goods (which will be difficult), or to export gold (which it is unlikely that he will

dare to do in sufficient quantity) or finally to decrease or cease his purchases abroad. His Majesty's Government therefore consider that the moment has come for bringing pressure to bear upon neutrals in order to deter them from rendering financial assistance to the enemy, and they suggest the use for this purpose of the very powerful weapon which the Allies possess in the control of the paramount financial markets of New York, London and Paris, as well as Milan and Petrograd.

"His Majesty's Government propose that a notice should be issued in the neutral European press in the following terms:

"The Governments of France, Great Britain, Italy, Russia and United States have decided that it may become inexpedient for banking houses in their respective territories to continue to have dealings with any banking house in . . . . . which engages directly or indirectly in:

"1. Granting of any loan, credit or overdraft or increase of any existing loan, credit or overdraft to an enemy of any of those five countries;

"2. The subscription to or purchase of any loan issued after this date by an enemy of any of those five countries;

"3. The purchase from or sale on behalf of an enemy of any of those five countries of any bond or certificate issued by the Government, or by any corporation or company in any of those five countries; or of any dividend warrant or coupon payable in any of those five countries, or of any note, bill of exchange or draft payable in any of those five countries;

"4. The collection, discounting or negotiation on behalf of an enemy of any of those five countries of any bond, note, bill of exchange, cheque, draft, dividend warrant or coupon payable in any of those five countries;

"5. Transmission by any means whatever of any document, letter, message or advice of any kind relating to any of above transactions." (Foreign Relations, U. S., 1917 Supplement 2, p. 924.)

On September 4, 1917, the Attorney General in a communication to the Secretary of State in regard to the British plan said:

"I understand the British proposition to be substantially as follows:

" 'That the United States should direct its citizens and banking houses in the United States to discontinue all intercourse, direct or indirect, with any banking house in another country which has any dealings with the class of persons defined as "enemy" by the United States; in other words, if a Brazilian bank A in Brazil should deal with B a German doing business within Brazil and also within Germany (and therefore an "enemy"), the United States should direct a United States citizen C to have no dealings with the Brazilian bank A.'

"The mere statement of the proposition, in my opinion, demonstrates the inadvisability, of any assent by the United States to such a course of action. It would amount clearly to the most

extreme form of black list of citizens of neutral nations—restricting American dealings with such neutral citizens simply because the latter might also be entering into transactions with German enemies perfectly legitimate under the law of the neutral nation. Of course, if the trade was to be carried on by a United States citizen with a neutral citizen as an indirect means of trading with the German enemy, it would be unlawful, under the law of the United States as at present constituted, and would be a criminal transaction under the terms of the pending Trading with the Enemy bill.

"I can not believe that it would be wise or just for this Government to assent to the proposition laid before you by the British Embassy." (Ibid., p. 941.)

Bonds, loans, etc. during the period of war.—The practice of neutral states in regard to limiting financial transactions with belligerents has varied greatly. Sometimes a single state has not maintained the same attitude throughout a war. The Joint Resolution of Congress of the United States of February 29, 1936, in Section 1a, provided that:

"Whenever the President shall have issued his proclamation as provided for in section 1 of this Act, it shall thereafter during the period of the war be unlawful for any person within the United States to purchase, sell, or exchange bonds, securities, or other obligations of the government of any belligerent country, or of any political subdivision thereof, or of any person acting for or on behalf of such government, issued after the date of such proclamation, or to make any loan or extend any credit to any such government or person: PROVIDED, That if the President shall find that such action will serve to protect the commercial or other interests of the United States or its nationals, he may, in his discretion, and to such extent and under such regulation as he may prescribe, except from the operation of this section ordinary commercial credits and short time obligations in aid of legal transactions and of a character customarily used in normal peace-time commercial transactions.

"The provisions of this section shall not apply to a renewal or adjustment of such indebtedness as may exist on the date of the President's proclamation." (49 Stat. 1153.)

Restrictions on travel of nationals.—As a state is in some degree responsible for the conduct and for the safety of its nationals, the state must have a reasonable control of the movements of its citizens. The requirement of some sort of registration before departure from the state's jurisdiction, travel permits or passport restrictions, may furnish sufficient control.

The restriction upon the issue of passports may extend to refusal to grant a passport or to grant only under conditions. During the World War, restrictions upon the issue of American passports became more and more detailed and the Secretary of State might refuse a passport "in his discretion."

In general a state may regulate the departure of its nationals from its jurisdiction, but is not under obligations to prohibit citizens from traveling on the high seas or in foreign states which respect the request of the passport.

On April 17, 1915, in a notice issued by the Department of State to American citizens who contemplated visiting belligerent countries it was said:

"It is believed that governments of countries which are in a state of war do not welcome aliens who are traveling merely for curiosity or pleasure. Under the passport regulations prescribed by the President January 12, 1915, passports issued by this Government contain statements of the names of countries which the holders expect to visit and the objects of their visits thereto. The Department does not deem it appropriate or advisable to issue passports to persons who contemplate visiting belligerent countries merely for 'pleasure,' 'recreation,' 'touring,' 'sight-seeing,' etc." (9 American Journal of International Law, Special Supplement, July, 1915, p. 391.)

In a letter of December 23, 1915, in regard to the Rules of December 17, 1915, governing the granting and issuing of passports in the United States, Mr. Lansing, Secretary of State, said:

"The object of the President's order is not to interfere with travel from this country, but to prevent the use of passports by persons who may obtain them by improper representations or for fraudulent purposes." (Foreign Relations, U. S. 1915 Supplement, p. 914.)

Mr. Bryan, the Secretary of State of the United States, in the first year of the World War, after the sinking of the *Falaba* and the *Lusitania*, in the note of May 13, 1915, after crediting Germany with the purpose to observe law, said:

"The Government of the United States has been apprised that the Imperial German Government considered themselves to be obliged by the extraordinary circumstances of the present war and the measures adopted by their adversaries in seeking to cut Germany off from all commerce, to adopt methods of retaliation which go much beyond the ordinary methods of warfare at sea, in the proclamation of a war zone from which they have warned neutral ships to keep away. This Government has already taken occasion to inform the Imperial German Government that it can not admit the adoption of such measures or such a warning of danger to operate as in any degree an abbreviation of the rights of American ship-masters or of American citizens bound on lawful errands as passengers on merchant ships of belligerent nationality; and that it must hold the Imperial German Government to a strict accountability for any infringement of those rights, intentional or incidental. It does not understand the Imperial German Government to question those rights. It assumes, on the contrary, that the non-combatants, whether they be of neutral citizenship or citizens of one of the nations at war, can not lawfully or rightfully be put in jeopardy by the capture or destruction of an unarmed merchantman, and recognize also, as all other nations do, the obligation to take the usual precaution of visit and search to ascertain whether a suspected merchantman is in fact of belligerent nationality or is in fact carrying contraband of war under a neutral flag." * * *

"American citizens act within their indisputable rights in taking their ships and in traveling wherever their legitimate business calls them upon the high seas, and exercise those rights in what should be the well-justified confidence that their lives will not be endangered by acts done in clear violation of universally acknowledged international obligations, and certainly in the confidence that their own Government will sustain them in the exercise of their rights.

"There was recently published in the newspapers of the United States, I regret to inform the Imperial German Government, a formal warning, purporting to come from the Imperial German Embassy at Washington, addressed to the people of the United States, and stating, in effect, that any citizen of the United States who exercise his right of free travel upon the seas would do so at his peril if his journey should take him within the zone of waters within which the Imperial German Navy was using submarines against the commerce of Great Britain and France, notwithstanding the respectful but very earnest protest of his Government, the Government of the United States. I do not refer to this for the purpose of calling the attention of the Imperial German Government at this time to the surprising irregularity of a communication from the Imperial German Embassy at Washington addressed to the people of the United States through the newspapers, but only for the purpose of pointing out that no warning that an unlawful and inhumane act will be committed can possibly be accepted as an excuse or palliation for that act or as an abatement of the responsibility for its commission." (Foreign Relations, U. S., 1915, Supplement, p. 394.)

The warning to which reference was made above is as follows and appeared in New York papers as an advertisement on May 1, 1915, the advertised sailing date of the Lusitania:

"Travelers intending to embark on the Atlantic voyage are reminded that a state of war exists between Germany and her allies and Great Britain and her allies; that the zone of war includes the waters adjacent to the British Isles; that, in accordance with formal notice given by the Imperial German Government, vessels flying the flag of Great Britain, or of any of her allies, are liable to destruction in those waters and that travelers sailing in the war zone on ships of Great Britain or her allies do so at their own risk.

IMPERIAL GERMAN EMBASSY,
Washington, D. C.

The note of May 3, 1915, closes with the statement:

"Expressions of regret and offers of reparation in case of the destruction of neutral ships sunk by mistake, while they may satisfy international obligations, if no loss of life results, cannot justify or excuse a practice, the natural and necessary effect of which is to subject neutral nations and neutral persons to new and immeasurable risks.

"The Imperial German Government will not expect the Government of the United States to omit any word or any act necessary to the performance of its sacred duty of maintaining the rights of the United States and its citizens and of safeguarding their free exercise and enjoyment." (Foreign Relations, U. S., 1915, Supplement, p. 396.)

Retaliation and neutral passengers.—It has been common to affirm that neutrals are liable to incidental consequences of retaliatory acts aimed by one belligerent against another. Acts of a retaliatory character may not, however, be directed toward a neutral with the hope of incidental injury to a belligerent.

In a note to the Secretary of State the German Ambassador in 1916, after the establishing of the war zone about Great Britain, it was explained that:

"The German submarine war against England's commerce at sea, as announced on February 1, 1915, is conducted in retaliation of England's inhuman war against Germany's commercial and industrial life. It is generally recognized as justifiable that retaliation may be employed against acts committed in contravention of the law of nations. Germany is enacting such retalia-

tion because it is England's endeavor to cut off all imports from Germany by preventing even legal commerce of the neutrals with her and thereby subjecting the German population to starvation. In answer to these acts Germany is making efforts to destroy England's commerce at sea, at least as far as it is carried on by enemy vessels. Germany has notwithstanding limited her submarine warfare, because of her long-standing friendship with the United States and because by the sinking of the *Lusitania*, which caused the death of citizens of the United States, the German retaliation affected neutrals which was not the intention, as retaliation should be confined to enemy subjects.

"The Imperial German Government having subsequent to the sinking of the *Lusitania* issued to its naval officers the new instructions which are now prevailing, expresses profound regret that citizens of the United States suffered by that event and, recognizing its liability therefor, stands ready to make reparation for the life of the citizens of the United States who were lost, by the payment of a suitable indemnity." (Foreign Relations, U. S., 1916 Supplement, p. 171.)

In a telegram of July 21, 1915, the American Ambassador in Germany to the Secretary of State referred to giving advance notice of the sailing of steamers from the United States.

"In order that such advance notification may take place in all cases with certainty, the schedule of the American steamer must be made known some weeks before the arrival of the ship in the war zone. It would be best if the notification were made early enough to have the German submarines acquainted with the name and schedule of the steamer one month before the arrival of the steamer in the war zone. Such an early notification can scarcely present insuperable difficulties, as the sailings of the steamers making regular journeys are generally fixed for a very long period in advance.

GERARD."

(Ibid., 1915 Supplement, p. 482.)

In a reply of July 23, the Secretary of State said,

"Department has made arrangements with the customs collector at port of New York, through Department of Commerce, to be notified immediately upon the departure of American passenger steamers, and will forward such information to you at once. Department suggests that you make arrangements to telephone this information direct to the German Admiralty, thus saving time. Department is also sending you by mail the advertised schedule of sailing of these ships which, however, may be subject to change." (Ibid., p. 484.)

Restriction on Act of February 29, 1936.—The Joint Resolution of February 29, 1936, in regard to the embargo

of arms, ammunition, and implements of war has not been interpreted in all its applications. Questions have been raised as to whether it applies in a civil strife.

Acting Secretary of State, Mr. William Phillips, on August 7, 1936, explained the attitude of the Government.

"While I realize that all of our officers have fully appreciated the necessity for maintaining a completely impartial attitude with regard to the disturbances in Spain, and that such an attitude has at all times been maintained by them, it may be well for them to have a summing up of what this Government's position thus far has been and will continue to be.

"It is clear that our Neutrality Law with respect to embargo of arms, ammunitions and implements of war has no application in the present situation, since that applies only in the event of war *between or among nations.* On the other hand, in internal affairs in other countries, either in time of peace or in the event of civil strife, this Government will, of course, scrupulously refrain from any interference whatsoever in the unfortunate Spanish situation. We believe that American citizens, both at home and abroad, are patriotically observing this well-recognized American policy." (Press Releases, Department of State, vol. XV, p. 152.)

Later in correspondence with manufacturers interested in the exportation of arms and ammunition to Spain it was further stated by the Department of State:

"In reply to your inquiry, I beg to say that the attitude and policy of this Government relative to the question of intervention in the affairs of other sovereign nations has been well known especially since the conclusion of the Montevideo Treaty of 1933.

"For your further information, I enclose a copy of a circular telegraphic instruction which was recently sent to certain consular representatives in Europe and which has not been made public up to the present.

"I desire to call especial attention to the reference therein to our neutrality laws and to the fact that they have no application in the present Spanish situation, since they apply only in the event of war between or among nations.

"Furthermore, I invite your attention with equal force to the reference, in the same circular instruction, to this Government's well established policy of non-interference with internal affairs in other countries, as well as the statement that this Government will, of course, scrupulously refrain from any interference whatsoever in the unfortunate Spanish situation. At the same time the Department expressed the opinion that American citizens, both at home and abroad, are patriotically observing this recognized American policy." (Ibid., p. 177.)

Spanish attitude on non-intervention, 1936.—The first delegate of Spain, M. Alvarez del Vayo, in the sixth plenary meeting of the Assembly of the League of Nations, September 25, 1936, set forth at length the attitude of the established government of Spain upon the policy of restriction by foreign states of export of war material to Spain. The central paragraphs of this address to the Assembly were as follows:

"The policy of non-intervention! I am speaking here before an assembly of statesmen, of representatives of Governments, on whose shoulders rests the responsibility for well-being and order in their respective countries. Who among you could fail to understand why it is that we, the men responsible for the future of Spain, for the future of the Spanish people, the whole Spanish people, must perforce regard so-called non-intervention as a policy of intervention detrimental to the constitutional and responsible Government? Who among you could fail to recognize that we cannot allow ourselves to be placed on the same footing as those who, breaking their solemn oath to the Republic, have risen in arms to destroy the constitutional liberty of our country?

"Who, among the statesmen present in this Assembly, could accept the right of generals, who have taken their oath to the Constitution, to attempt to overthrow that Constitution by bringing into the country thousands of foreign troops from another continent?

"I acknowledge the noble and generous purpose that actuated the proposal for non-intervention. But I must also, and with deep bitterness, point to its disastrous results, disastrous both to my own country and to the future of international cooperation. The legal monstrosity of the formula of non-intervention is manifest. That formula, as I have said, placed on the same footing the lawful Government of my country and the rebels, whom any Government worthy of the name is not only entitled but bound to suppress and punish. From the juridical point of view, non-intervention, as applied to Spain, represents an innovation in the traditional rules of international law, for it means withholding means of action from a lawful Government.

"But if we examine the actual way in which the formula of non-intervention has been applied and the results that have ensued, can we still call it 'non-intervention'? Non-intervention should consist wholly in ignoring the internal situation of a county and in retaining the full juridical and practical validity of the commercial agreements previously concluded.

"We would accept a strict policy of non-intervention. We have asked no one to intervene or to help. But when the normal commercial relations with Spain are suddenly interrupted, when the export of war material for the lawful Government suddenly stops, when contracts concluded with the Spanish Government before the rebellion are cancelled, then we must affirm once again

that this policy of non-intervention has been applied solely to the detriment of the lawful Government and, consequently, to the advantage of the rebels.

"To undertake not to authorise the sending of war material to rebels who have risen against a lawful and recognised friendly Government—that is to say, to undertake not to engage in a disguised form of attack against a lawful Government—merely shows to what depths we have sunk in carrying out international obligations. Such an undertaking does not deprive the rebels of anything they could legitimately have obtained; it involves no more than a promise not to violate one of the most elementary obligations.

"On the other hand, to prohibit the export of war materials to a lawful Government is to deprive it of the essential means of maintaining law and order within its territory, to say nothing of the blow struck at normal trade relations through a ban on the purchase of war materials by a lawful Government. Hitherto, it has been unanimously recognised that such transactions were part of the normal trade relations between countries.

"In practice, the so-called policy of non-intervention amounts to a direct and effective intervention on behalf of the rebels." (League of Nations Official Journal, Spec. Supplement No. 155, Records of the Seventeenth Ordinary Session of the Assembly. [Sixth Plenary Meeting. Sept. 25, 1936], p. 49.)

League of Nations discussion.—The first delegate, M. Litvinoff, of the U. S. S. R., speaking in the seventeenth ordinary session of the Assembly, September 28, 1936, did not regard neutrality as a safe defence under the existing conditions. He said:

"I have not the slightest doubt that even the most politically inexperienced reader of newspapers knows which and how many are the countries whose aggressiveness makes them dangerous, if he is only familiar with the speeches and writings of the rulers of those countries. There are also some countries which strive to seek salvation in neutrality. If they really believe that it would be sufficient for them to write the word 'neutrality' on their frontiers, there to arrest the flames of war, and if they have forgotten the recent lessons of history as to breaches of even internationally recognized neutralities, that is their affair. We have the right, at least, to ask them already to observe their neutrality to-day, when some are preparing plans of aggression and others plans for self-defence. Unfortunately, they are often already placing their neutrality at the service of the forces of aggression." (*Ibid.* [Eighth Plenary Meeting. Sept. 28, 1936], p. 61.)

Résumé.—On many of the matters which were in 1914 considered as unquestionably within the sphere of neutral rights, the United States took positive positions.

The United States had even announced that it would act as the "champion of neutrality." A long series of notes between the belligerents and the United States set forth many of the doctrines of neutrality for which the United States affirmed support. This verbal support acted as a deterrent upon the belligerents for a short time only, and disregard of what had formerly been considered neutral rights became more and more common, though notes were exchanged after the event. The replies to the notes of the United States to the belligerents seem to have been deliberately postponed in some cases and before the replies had been received, new events changed conditions.

In these contentions from August 4, 1914, to April 6, 1917, the United States often cited the earlier principles and the precedents of neutrality cases. The Department of State called attention to the international law of neutrality and demanded that it be respected. The conventions adopted at The Hague in 1907 were cited as showing the rights and obligations of neutrals.

In general, the attitude had been that in time of war neutrals should be inconvenienced as little as possible, and if states decided to go to war, the burdens of the war should rest upon the belligerents.

The determination as to whether there was a state of war was in accord with the Hague Convention III of 1907, Article 1, to rest upon the belligerent, and in accord with Article 2 should not take effect as regards neutrals "until after the receipt of a notification" though in case of doubt, if the fact was clearly known, absence of notification would not void the effect of the existence of war.

The neutral was not presumed to act upon the hypothesis that a state of war existed prior to the declaration. The preamble of Convention III had specifically

said that it was "important for the maintenance of pacific relations that hostilities should not commence without previous warning." In the arguments in support of this Convention it was urged that without such a Convention the effects of the war would be thrown back upon the time of peace, and uncertainty as to the time when war commences would again disturb relations and introduce the uncertainty that had existed for two hundred years before.

It was also maintained by the United States that the rights and obligations of the neutrals should be those generally accepted under international law in August 1914. The statement as to many of these was embodied in the neutrality proclamation of the United States of August 4, 1914.

The Joint Resolutions of August 31, 1935, together with the extensions and amendments of February 29, 1936, placed upon the United States obligations beyond those of international law in regard to the control of the sale and export of war material, financial transactions, submarines, travel of nationals, etc.

CONCLUSION

From August 4, 1914, to April 6, 1917, the United States, as a neutral state, followed its long-established neutrality policy which was in general accord with accepted international law.

The Joint Resolution of February 29, 1936, embodied a nationalistic policy in many respects divergent from the prior policy of the United States and from the generally accepted doctrines of international law.

The change in 1935–36 to a doctrine for the most part nationalistic has placed nationals of the United States under restrictions beyond those imposed by international law.

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